No. 75-1821

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

ABBOTT LABORATORIES, ROSS LABORATORIES DIVISION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Petitioner, Abbott Laboratories, Ross Laboratories Division ("Abbott"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 31, 1976, enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion by a panel of the court of appeals (Circuit Judge Winter and Associate Justice Clark, Supreme Court of the United States, retired, sitting

by designation; Senior Circuit Judge Bryan dissenting) is not yet officially reported but is reproduced in Appendix A, *infra*, pp. 1a-17a. The Decision and Order of the National Labor Relations Board in the unfair labor practice case is reported at 217 NLRB No. 117, and is set forth herein, *infra*, at pp. 19a-34a of Appendix C.

The National Labor Relations Board's Decision and Order and Supplemental Decision and Certification of Representative in the underlying representation case, together with the Regional Director's Report and Supplemental Report on Objections, and the Hearing Officer's Report on Objections, are unreported but are reproduced herein in Appendices F, D, H, G, and E, respectively at pp. 35a-93a, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1976 (App. B, p. 18a).[1] Prior to the entry of judgment, a suggestion for rehearing *in banc* and a request for a poll was made *sua sponte* within the court. A majority of the judges eligible to vote voted to deny rehearing *in banc* (App. A, p. 17a).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board and the court below applied an erroneous standard for evaluating the impact of union campaign propaganda upon employee

[1] Reference to the Appendices to this Petition are designated "App. , p. ."

free choice in upholding an election where the union made deceptive and misleading statements regarding its bargaining accomplishments.[2]

2. Whether the court of appeals grossly misapplied the substantial evidence test in upholding an election, which the union won by a single vote, in view of overwhelming evidence that employees were threatened with violence if they did not support and vote for the union and uncontradicted evidence that at least one threatened employee voted for the union against his wishes.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.* ("the Act"), and the National Labor Relations Board's Rules and Regulations are set forth in Appendix I, *infra*, pp. 94a-95a.

[2] In addition, the following subsidiary and related question is presented:

> Whether the Board and the majority of the court below denied Abbott due process of law by refusing to grant a hearing on Abbott's objection to the deceptive and misleading misrepresentations perpetrated by the union just prior to the election.

Should Abbott's position be accepted with respect to the principal question, the court may also deem it appropriate to review the subsidiary question. In order to preserve Abbott's position with respect to the latter issue, it is specifically adverted to herein.

STATEMENT OF THE CASE

A. Proceedings Before The Naitonal Labor Relations Board

1. *The Representation Proceeding*

On July 20, 1973, the Board conducted an election among a unit of production and maintenance employees at Abbott's Altavista, Virginia plant, pursuant to a petition filed by the Union.[3] The results of the election, after challenges were resolved, were 22 votes for and 20 votes against the Union (App. F, p. 64a).

Abbott filed timely objections to the election on July 27, 1973, contending, *inter alia*, that during the critical preelection period[4] (1) the Union distributed a letter, dated July 17, 1973, to Abbott employees, which misrepresented its bargaining relationship with and achievements on behalf of employees at a nearby plant, and which was designed to mislead Abbott employees into supporting the Union, and (2) the Union coerced and intimidated Abbott employees with threats of physical violence (App. H, pp. 74a, 85a).[5]

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[3] Textile Workers Union of America, AFL-CIO.

[4] The Union's petition for election was dated April 13, 1973. Thereafter, Abbott and the Union entered into an election agreement defining the scope of the unit in which the election was to be held and setting an election date of July 20, 1973. This agreement was approved by the Board's Regional Director on May 22, 1973 (App. H, pp. 73a, 74a, n. 2).

[5] Abbott raised several other objections to the conduct affecting the results of the election and to the conduct of the election itself. However, the panel majority of the court below refused to disturb the Board's determination that those objections were not sufficient to invalidate the election (App. A, pp. 3a-5a), and such objections are not at issue here.

a. *The Union's Misrepresentation.*

The Union's letter to Abbott employees dated July 17, 1973, included the following statement which was set forth therein in boldface caps (App. H, p. 85a).

> WHY DOESN'T THE COMPANY TALK ABOUT MERCK CHEMICAL COMPANY, INC. IN ELKTON, VIRGINIA. THEY ARE IN THE SAME INDUSTRY AS ROSS. WHY DON'T THEY TELL YOU WE HAVE JUST NEGOTIATED A SUBSTANTIAL WAGE INCREASE, IMPROVEMENT IN INSURANCE, IMPROVEMENT IN PENSIONS, HOLIDAYS, ETC., ALL OF THIS WITHOUT A STRIKE. THE REASON THEY DON'T WANT TO TALK ABOUT THIS IS BECAUSE IT DOESN'T FIT INTO THEIR PATTERN OF TRYING TO DIVIDE AND SCARE.

During the *ex parte* investigation of the objections to the election conducted by the Board's Regional Director, Abbott presented the following evidence, which it offered to prove at a subsequent hearing, regarding the Union's July 17 letter: (1) Merck Chemical Company has plants located throughout the United States which employ several thousand persons. All Merck production and maintenance employees (the employee unit sought by the Union in the instant case) are represented either by the Oil, Chemical and Atomic Workers ("OCAW") or the International Chemical Workers Union ("ICWU"). The ICWU represents the 325 production and maintenance employees at Merck's Elkton plant. The only Merck employees represented by the Union are 33 clerical and technical personnel at the Elkton plant. (2) The then recently negotiated Merck master contract covered some 3,000 employees and was the product of nation-

wide coordinated bargaining between Merck, the OCAW and the ICWU. The Union, while "officially" a participant in coordinated bargaining by virtue of its representation of 33 office and technical employees at Elkton, in fact, never acted as spokesman for the unions and did not even attend a substantial number of the bargaining sessions. (3) Abbott received a copy of the Union's letter on the afternoon of July 19, 1973—less than 24 hours before the election.

Based upon the foregoing facts, Abbott argued to the Regional Director that the Union's July 17 letter constituted a material deception designed to mislead Abbott's employees into believing that the Union was responsible for "substantial benefits" received by comparable production employees in the same industry at the Merck plant. Abbott further contended that its employees were not in a position to determine the true and complete facts for themselves and that the timing of the letter precluded Abbott from obtaining the facts necessary to expose the Union's deception.

The Regional Director issued a Report on Objections on September 26, 1973, in which he concluded that the objected-to language contained in the Union's letter did not constitute a misrepresentation since nothing stated therein was "false as regards the existence or the quality of benefits claimed," nor was it a misstatement of fact that such benefits "were obtained without a strike." Accordingly, the Regional Director recommended that Abbott's objection to the Union's July 17 letter be overruled (App. H, p. 86a).[6]

[6] The Regional Director also recommended that all other election objections be overruled and that the Union be certified by the Board (App. H, p. 93a).

Thereafter, Abbott filed timely exceptions to the Regional Director's Report. On January 16, 1974, the Board issued a Decision and Order in which it ordered a hearing on certain of Abbott's objections but adopted the Regional Director's rulings and recommendations with respect to Abbott's objection to the Union's letter of July 17 (App. F, p. 66a).

b. *Coercive Conduct Affecting The Results Of The Election.*

In its January 16, 1974, Decision and Order, the Board found that Abbott's objection concerning threatened preelection violence (*supra*, p. 4), raised a material issue of fact which could best be resolved in a hearing (App. D, p. 36a; App. F, p. 66a). During the hearing held on March 6-8, 1974, the following record evidence was developed with regard to this objection.

Employee Frederick Tubbs testified that, on three separate occasions during the election campaign, Cecil Hall, another Abbott employee whose extensive criminal record was known around the plant and who characterized employees opposed to the Union as "yellow-bellied sons of bitches," threatened him (Tubbs) with violence if he did not support the Union.[7] Hall's initial warning was made at a Union

[7] The Union's organizational drive began at Abbott's plant in April 1973. Union vice-president Wayne Dernoncourt testified that throughout the period preceding the election he relied exclusively on several key employees, particularly Cecil Hall, to promote the Union and organize the plant. Based upon a statement furnished by Dernoncourt, the Regional Director found in his Report on Objections that Hall was "elected by pro-Union employees to be a 'contact man between the employees and [Union]'" (App. H, p. 76, n. 5). The

meeting held at Leesville Dam during May or June 1973. Hall asked Tubbs whether Tubbs was "for the Union." When Tubbs replied that he was, Hall stated "if I [Tubbs] did not vote for the Union, he was going to throw me in the lake." The second threat was made in early July, about two weeks before the election, at a Union meeting held at Wayside Park. Again Hall asked Tubbs if he was "still for the Union," and when Tubbs answered "yes," Hall said, "if you [Tubbs] don't vote for the Union, I am going to kick your ass." [8] The third incident occurred about

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Hearing Officer found that Hall was an active pro-Union advocate who attended most Union meetings; that Hall signed a Union card and strongly urged other employees to sign Union cards; that Hall functioned as one of the employees selected to maintain frequent contact with the Union in order to report organizational developments and receive instructions with regard to setting up Union meetings and other related campaign efforts; and that Hall, subsequently, served as a Union observer at the election (App. E, pp. 47a-49a). Hall testified that he circulated throughout the plant and actively promoted the Union on almost every workday during the course of the campaign. Moreover, several employee witnesses also testified that Hall was recognized as the leader and chief proponent of the Union movement within the plant. In spite of this evidence, the Hearing Officer concluded that Hall's conduct during the campaign was not attributable to the Union (App. E, pp. 50a-51a). Thereafter, in its Supplemental Decision and Certification, the Board relied upon the Hearing Officer's credibility resolutions in overruling Abbott's objection based on Hall's conduct and found it unnecessary to determine whether Hall's conduct was properly attributable to the Union (App. D, p. 37a, n. 2; see *infra*, p. 11, n. 10).

[8] Tubbs explained that the expression "kick your ass" meant "get to you and work you over . . . they would beat you up." Tubbs further testified that he did not take Hall's first comment seriously, but that Hall's subsequent threats convinced him that Hall meant what he said (App. A, pp. 6a, 12a; App. E, p. 43a).

one week later at the plant while Tubbs was punching the time clock. At that time, Hall again reiterated his threat to Tubbs by stating "if you [Tubbs] don't vote for the Union, I am going to kick your ass." (App. A, pp. 5a-6a; App. E, pp. 42-43a).[9] Tubbs further testified that he was intimidated into voting for the Union by Hall's threats (App. A, pp. 11a-12a).

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[9] During the Regional Director's investigation of the objections, Tubbs denied that Hall had threatened him. Tubbs explained at the hearing, however, that these denials were inaccurate and had been provoked by the continuing harassment of Hall and other Union supporters (App. A, pp. 15a-16a). Moreover, Tubbs' testimony at the hearing regarding these threats was corroborated by the testimony of employees Wayne Crews and Gerald Doss.

By contrast, Hall, in his previous affidavit to the Board, denied ever threatening "to kick" Tubbs. At the hearing, however, Hall never specifically disclaimed having made the remarks attributed to him by Tubbs and admitted that he told Tubbs at the Wayside Park meeting:

> Fred, you are in a world of trouble because Jim is going to kick you if you do and I am going to kick you if you don't [support the union]. (App. A, pp. 16a-17a; App. E, p. 44a).

Hall, in his uncorroborated testimony, dismissed this occurrence as a mere jest and stated that he never "threatened" Tubbs. Hall (attempting to reconcile the inconsistency between his affidavit and subsequent testimony) claimed that he had related the above-quoted statement concerning his threat "to kick" Tubbs to the Board investigator who took his affidavit and maintained that the investigator neglected to include the incident in Hall's affidavit.

On still a fourth occasion prior to the election, Hall threatened to kill or beat up another employee, Gerald Doss, if Doss continued to participate in counter-Union efforts. Doss testified that employee Wayne Crews warned him that "he had better watch himself because Hall was out to get him." Crews testified that this warning resulted from the following statement—also relayed to Doss—which was made by Hall to Crews as they observed Doss engage in counter-Union activity:

> . . . Cecil Hall spoke up and said I would like to kill the son of a bitch [Doss]. Then he paused for a second and said, no, he wouldn't want to kill him. I just would like to beat the hell out of him. (App. A, p. 6a; App. E, p. 47a).

The Hearing Officer issued a Report on April 4, 1974, recommending that Abbott's objection based on Hall's threats be overruled. The Hearing Officer concluded on the basis of credibility that Hall made no threatening statements to either Tubbs or Doss; that Hall's admitted remark to Tubbs at the Wayside Park meeting "was made in jest and in such a posture had no effect upon the election"; that no "atmosphere of fear and coercion" existed prior to the election; and accordingly, that the objection did "not raise substantial and material issues with respect to conduct affecting the results of the election" (App. E, pp. 52a, 54a-55a).

Abbott filed timely exceptions to the Hearing Officer's report with the Board, excepting to the Hearing Officer's findings in general and in particular to his credibility resolutions disposing of the objection based on Hall's threats. On October 22, 1974, the Board issued its Supplemental Decision and Certification

of Representative, finding that the Hearing Officer's rulings were free from prejudicial error and adopting *pro forma* the Hearing Officer's recommendation including his credibility resolutions.[10] Accordingly, the Board certified the Union as a bargaining representative of Abbott's employees (App. D, p. 38a).

2. *The Unfair Labor Practice Proceeding*

In order to test the validity of the Board's certification, and to obtain appellate review of its election objections, Abbott refused to bargain with the Union. As a result, the Board issued a complaint on December 4, 1974, alleging that Abbott was engaging in an unlawful refusal to bargain within the meaning of Section 8(a)(5) and (1) of the Act (App. C, p. 19a). On January 7, 1975, the General Counsel filed a motion for summary judgment with the Board, and on January 13, 1975, the Board issued a notice to show cause why the General Counsel's motion for summary judgment should not be granted (App. C, p. 20a). Abbott subsequently filed a response to the notice to show cause alleging, *inter alia*, that the Board wrongfully deprived it of a hearing on its objection which raised the Union misrepresentation issue and that the Hearing Officer's rulings at the hearing regarding its objection based on threats of violence were erroneous, not supported by substantial evidence on

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[10] As to Abbott's objection based on Hall's threats (Objection 1), the Board specifically stated:

> In agreeing that Objection 1 should be overruled, we rely upon the Hearing Officer's credibility resolutions . . . [and] find it unnecessary to reach the merits of the alleged threats . . . (App. D, p. 37a, n. 2).

the record as a whole, contrary to law, and constituted a denial of due process.

On May 9, 1975, the Board issued a Decision and Order in which it granted the General Counsel's motion for summary judgment. The Board predicated this determination upon a finding that Abbott's defense raised issues that had been or could have been litigated in the underlying representation proceeding. Specifically with regard to those of Abbott's objections—including its objection to the Union's July 17 letter—which had previously been overruled without a hearing, the Board again stated that such objections did not raise issues warranting a hearing. As to those of Abbott's objections—including its objection based on threats of violence—upon which a hearing had been held, the Board relied upon its prior adoption of the Hearing Officer's recommendations and its finding that the Hearing Officer's rulings were "proper and not prejudicial" (App. C, pp. 24a-25a).

B. The Decision Of The Court Of Appeals

Pursuant to Section 10(f) of the Act, Abbott petitioned the United States Court of Appeals for the Fourth Circuit to review and set aside the Board's Decision and Order. A majority of a panel of the court below, with Senior Circuit Judge Bryan dissenting, denied Abbott's petition and enforced the Board's order.

The panel majority upheld the Board's refusal to conduct a hearing on Abbott's objection which raised the Union misrepresentation issue, stating, in this regard, that the Board properly found that there was no misrepresentation, since the Union had participated in the claimed negotiations, and the failure

to disclose that other unions had played a dominant role in the bargaining was not a material omission (App. A, p. 3a, n. at 4a). With respect to Abbott's contention that threats of violence affected the results of the election, the majority stated that this issue depended largely upon "the [hearing officer's] resolution of conflicting testimony based upon the credibility of the witnesses," and that "we cannot say that the record fails to support his conclusion that the election was not prejudiced by threats of violence" (App. A, p. 10a). In this regard the majority stated further that "Tubbs was unable to say . . . whether his vote in the representation election had been influenced [by Hall's threats]" (App. A, p. 6a).

Judge Bryan dissented from what he termed "the Board's amazing determinations," which permitted an "insufferable intrusion upon the privileges of participants in a secret balloting" and resulted in the Board's "tolerat[ion of] a gross deprivation of [this] right" (App. A, pp. 11a, 12a, 17a).

In Judge Bryan's view, "the election resulted in so close a tally—22 to 20—in favor of the Union that the misconduct of the Union's electioneering deserves uncommon scrutiny," and in reviewing the record, he found that the Board's resolution of the preelection threats issue was not supported by "substantial evidence." With specific reference to Hall's threats against employees Tubbs and Doss, Judge Bryan stated that if either Tubbs or Doss had "been allowed to express his preference in the election . . . the result would have been a tie or defeat for the Union" (App. A, p. 11a). Judge Bryan determined, on the basis of the record, that Hall's threats had,

in fact, coerced Tubbs into voting for the Union and that Tubb's vote provided the Union's margin of victory (App. A, pp. 11a-13a).

That there was a denial of this right is squarely proved by the following colloquy of the Hearing Officer and Tubbs, who was browbeaten by Hall to vote for the Union and thus gave victory to the Union:

"HEARING OFFICER: Did Mr. Hall's comments affect the way you voted?

WITNESS: I believe so.

HEARING OFFICER: How would it affect?

WITNESS: It could have. Because I did not know—I could not make my mind up. I was scared.

* * * *

"HEARING OFFICER: Let me return to the point that I was trying to establish. Did the comments that Mr. Hall made to you affect the way you voted? Did you vote the way you intended to vote when you went into the voting place, the polling area?

WITNESS: No, sir, I did not.

HEARING OFFICER: You did not vote the way you wanted to?

WITNESS: No, sir. I thought about it. He done told me three times before the election that he was going to do something to me and so I started not to vote either way. I started not to vote either way and then I figured that I had to vote one way so I went in the booth and I came out and then I went back in again and made my mark.

* * * *

"HEARING OFFICER: Did Mr. Hall's comments to you threatening to throw you in the lake and threatening to kick your ass, did that affect the way you voted? Were you persuaded to vote for his position?

WITNESS: Yes, I would say so."

Judge Bryan further stated that the Board's acceptance of Hall's claim that he never "threatened" Tubbs "rested upon the overworked refuge of the Board: that it is the final judge of credibility." Rejecting the majority's acceptance of the "Board's ipse dixit" as incompatible with this Court's decision in *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474 (1951), Judge Bryan concluded that the Board's decision was not supported by "substantial evidence" and that, at a minimum, a new election was required (App. A, pp. 13a, 17a).

REASONS FOR GRANTING THE WRIT

1. In determining that the Union's letter of July 17 did not contain misrepresentations, the Board applied an erroneous standard for evaluating campaign propaganda. Moreover, in enforcing the Board's Decision and Order which was predicated in part upon the application of this erroneous standard, the majority of the court below rendered a decision which conflicts with the decisions of other courts of appeal both in reasoning and result.

a. The ultimate issue before the Board was whether the Union's July 17 campaign propaganda contained false or misleading statements which had the effect of interfering with the employees' free choice of a bargaining representative. *N.L.R.B.* v.

Mr. Fine, Inc., 516 F.2d 60, 63 (5th Cir. 1975); *Thiem Industries, Inc.* v. *N.L.R.B.*, 489 F.2d 788, 790 (9th Cir. 1973). Prior Board and court decisions agree in principle that, in making this determination, the Board should set aside election results where the objected-to propaganda (1) contains a material misrepresentation, (2) comes from a party who is in a position to know the true facts, and (3) is distributed at a time which prevents effective rebuttal before the election. *Hollywood Ceramics Co., Inc.*, 140 NLRB 221, 223-224 (1962); *N.L.R.B.* v. *Mr. Fine, Inc.*, *supra*, 516 F.2d at 62; *Thiem Industries, Inc.* v. *N.L.R.B.*, *supra*, 489 F.2d at 791 n. 3; *N.L.R.B.* v. *Millard Metal Service Center, Inc.*, 472 F.2d 647, 650 (1st Cir. 1973); *N.L.R.B.* v. *Bata Shoe Co.*, 377 F.2d 821, 829 (4th Cir. 1967), *cert. denied*, 389 U.S. 917 (1967); *cf. Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 60 (1966).[11]

In finding that the Union's July 17 letter did not contain a misrepresentation, the Board deemed it unnecessary to conduct a hearing or even administratively consider the other factors bearing on the issue of whether the objected-to language interfered with employee free choice.[12] This determination was clear-

[11] The cases also indicate that such additional factors as (1) whether the employees had independent knowledge of the misrepresentation so that they could effectively evaluate the propaganda, (2) whether the misrepresentation involved matters of importance to employees, and (3) the closeness of the election vote, will also be considered in determining whether there was interference with employees' free choice.

[12] Elementary concepts of due process, as well as the Board's own Rules and Regulations, require that a hearing be conducted at some stage of the administrative proceedings when-

ever objections to an election raise substantial and material issues of fact. *N.L.R.B.* v. *Smith Industries, Inc.*, 403 F.2d 889, 892 (5th Cir. 1968); *N.L.R.B.* v. *Bata Shoe Co., supra*, 377 F.2d at 825; NLRB Rules and Regulations Section 102.69(f), 29 C.F.R. 102.69(f); *cf. N.L.R.B.* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, 28 (1943). Moreover, for the purpose of evaluating an election objection to determine whether a hearing is required, the Board and the courts are bound to accept and credit all evidence proffered by the objecting party. *N.L.R.B.* v. *G. K. Turner Associates*, 457 F.2d 484, 487 (9th Cir. 1972); *N.L.R.B.* v. *Smith Industries, supra*, 403 F.2d at 892; *N.L.R.B.* v. *Bata Shoe Co., supra*, 377 F.2d at 826.

Examination of the evidence (*supra*, pp. 5-6), in the context of the criteria set forth above by which alleged misrepresentations are to be evaluated, shows the following with regard to the Union's July 17 statement. (1) The Union's representations concerned a contract which it claimed to have negotiated. Hence, the Union cannot deny that it was in a position to know the true facts. (2) Abbott received a copy of the Union's letter less than 24 hours before the election and, thus, was precluded from effectively rebutting the misrepresentations therein. (3) The representations involved wages and benefits which were critical factors bearing on the attractiveness and efficiency of the union as the employees' representative. *N.L.R.B.* v. *Mr. Fine, Inc., supra*, 516 F.2d at 64; *Graphic Arts Finishing Co., Inc.* v. *N.L.R.B.*, 380 F.2d 893, 896 (4th Cir. 1967). (4) The tally of ballots was so close—22 to 20—that a misrepresentation which affected a single vote would have reversed the election results. (5) There is no evidence in the record indicating that the employees possessed independent knowledge of the Merck negotiations with which effectively to evaluate the Union's representations.

Thus, if, as Abbott contends herein, the Board applied an erroneous standard for determining whether the Union's letter contained misrepresentations, it must be concluded that, at the very least, Abbott's objection raised substantial and material facts regarding the effect of the misrepresenta-

ly erroneous since the Board applied an unduly restrictive standard for determining whether a misrepresentation had occurred. Thus, the Board adopted the Regional Director's finding that the Union's letter did not contain a misrepresentation because nothing stated therein was false *per se*.[13] However, language need not be false to establish a misrepresentation. As we show below, "half-truth" representations which omit material facts and are inherently deceptive constitute misrepresentations, and court decisions have repeatedly rejected the Board's attempts to limit the misrepresentation standard to false statements.

In *N.L.R.B.* v. *Mr. Fine, Inc.*, *supra*, the Fifth Circuit rejected the conclusion of the Board's Regional Director that the union had not perpetrated a misrepresentation because "the statement objected to by the Company was accurate and did not incorrectly state the facts." 516 F.2d at 62. The court found that the union's statements, concerning wage rates which it had negotiated for employees at a competing plant, were true on their face but were nevertheless misleading and deceptive and, accordingly, the court concluded that such statements constituted misrepresentations.[14] Rejecting the notion that the misrepresentation standard embraces only false statements of fact, the court stated (516 F.2d at 61 n. 1):

> The Company does not assert that the statement is untrue; instead, it contends that it was a half truth, inherently deceptive and misleading. The distinction is immaterial. A misrepresentation need not be false to establish unfairness in an election. Implications, omissions or half truths from which false inferences may be drawn, if such inferences have an impact on election results, have been accorded the same status as an outright untruth.

Accord: N.L.R.B. v. *Bill's Institutional Commissary Corp.*, 418 F.2d 405 (5th Cir. 1969), in which the union distributed a letter to Bill's employees in New Orleans which included a wage scale taken from a union contract covering comparable employees in New York. The fact that the wage rates covered New York employees was not disclosed. The Regional Director found no misrepresentation had been made since the reproduced wage scale was accurate. The court disagreed, finding that the union, by failing to

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tions upon the employees' free choice. Accordingly, the failure to grant a hearing under these circumstances denied Abbott due process of law.

[13] Moreover, it is clear that in finding *Zarn, Inc.*, 170 NLRB 1135 (1968), and *Allis Chalmer's Mfg. Co.*, 176 NLRB 588 (1969) inapposite to the instant case (App. H, p. 86a), the Regional Director placed primary reliance upon the falsity of the misrepresentations in those cases. *See* 170 NLRB at 1135 where the Board emphasized the "misquotation" of contract language and 176 NLRB at 588, 589, where the Board termed the Union's representations regarding benefits "patently false" and "a substantial departure from the truth."

[14] Two days prior to the election therein, the union distributed leaflets to employees setting forth wage rates which had been negotiated at a competitor plant. While the quoted rates were accurate, the union did not disclose the job categories to which the rates applied. Finding that Mr. Fine's unit employees did not work in the job categories covered by the higher wage rates paid at the competitor plant, the court concluded that Mr. Fine's employees were misled to believe the union could achieve the higher rates for them. 516 F.2d at 61-62.

clarify the fact that the wage rates were applicable in New York, misled Bill's employees to believe that the quoted rates were obtainable or in existence in the New Orleans area. In reaching this determination, the court stressed that "claims involving wages and benefits which are based upon unstated hypotheses constitute a prima facie misrepresentation." 418 F.2d at 407.[15] Moreover, decisions of the courts of appeals for the First, Seventh and Ninth Circuits reflect the view of the Fifth Circuit that a misrepresentation exists whenever a statement, albeit not false *per se*, is deceptive or misleading because it is based upon half truths or unstated hypotheses from which false inferences may reasonably be drawn. *N.L.R.B.* v. *Millard Metal Service Center, Inc., supra,* 472 F.2d at 648-651; *N.L.R.B.* v. *Maine Sugar Industries, Inc.*, 425 F.2d 942, 944-945 (1st Cir. 1970); *Celanese Corp. of America* v. *N.L.R.B.*, 279 F.2d 204 (7th Cir. 1960), *vacated and remanded,* 365 U.S. 297 (1961), *enforcement denied on remand,* 291 F. 2d 224 (1961), *cert. denied,* 368 U.S. 925 (1961); *Winchell Processing Corp.* v. *N.L.R.B.*, 451 F.2d 306,

[15] The Fifth Circuit reached the same result utilizing substantially identical reasoning in *National Cash Register Co.* v. *N.L.R.B.*, 415 F.2d 1012, 1016 (1969) ("'[t]he form of presentation employed by the Union is in and of itself misleading'"); *N.L.R.B.* v. *Smith Industries, Inc., supra,* 403 F.2d at 894 ("additional information as to job classifications was necessary to make meaningful comparisons with other competitors"); and *N.L.R.B.* v. *Houston Chronicle Publishing Co.*, 300 F.2d 273, 278 (1962) (campaign propaganda, "regardless of [its] truth or falsity, which make[s] impossible an impartial test [of employee desires], [is] grounds for invalidation of an election").

(9th Cir. 1971); *Gallenkamp Stores Co.* v. *N.L.R.B.*, 402 F.2d 525, 532-535 (9th Cir. 1968).

Despite these decisions of the Fifth, First, Seventh, and Ninth Circuits which recognize misrepresentations based upon half-truths or unstated hypotheses, the Board has continued in this case to limit application of the misrepresentation concept to statements of fact which are false *per se*. This conflict presents an important issue of recurring significance in the Board's administration of representation elections under the National Labor Relations Act which should be resolved by this Court.[16]

b. The decision of the court below, which resulted in adoption of the Board's rationale limiting misrepresentation findings to statements which are false *per se*,[17] conflicts with both the rationale and result of the circuit court decisions cited above. In view of

[16] The Board conducted 8,577 representation elections during the past fiscal year in which 501,996 employees cast ballots. The losing party filed objections to 1,230 of these elections. Fortieth Annual Report of the National Labor Relations Board, pp. 228, 241 (G.P.O. 1975). A large proportion of these objections involved claims that a misrepresentation had affected the results of the election.

[17] As stated *supra,* p. 6, the Regional Director found that the Union had not perpetrated a misrepresentation and, accordingly, he never reached the issue of whether the alleged misrepresentation was material. The Board adopted the Regional Director's finding on the misrepresentation issue *pro forma. Supra,* p. 7. Thus, there is no basis in the record for the statement of the court below that "[t]he Board found that . . . failure to disclose the fact that other unions played a dominant role in the bargaining was not a material omission" (App. A, p. 3a, n. at 4a; see *supra,* pp. 12-13).

this conflict, it is submitted that the issue of whether an inherently deceptive or misleading representation —albeit not false *per se*—constitutes a misrepresentation which must be further evaluated to determine if it interfered with an election, should be decided by the Court.

2. The majority below grossly misapplied the requirement that Board orders not be enforced unless supported by substantial evidence "on the record as a whole." *Universal Camera Corp.* v. *N.L.R.B.*, *supra;* Section 10(f), National Labor Relations Act. In *Universal Camera*, this Court circumscribed its review of the correctness of the courts of appeals' application of the substantial evidence standard to instances wherein "the standard appears to have been misapprehended or grossly misapplied" (340 U.S. at 491). *Accord*: *Mobil Oil Corp.* v. *F.P.C.*, 417 U.S. 283, 310 (1974); *Golden State Bottling Co.* v. *N.L.R.B.*, 414 U.S. 168, 172-174 (1973); *N.L.R.B.* v. *Walton Mfg. Co.*, 369 U.S. 404, 408 (1962); *see Central Hardware Co.* v. *N.L.R.B.*, 407 U.S. 539, 548 (1972). As shown below, the majority in this case contravened the teachings of *Universal Camera* by abdicating its responsibility "of assuring that the Board keeps within reasonable grounds" (340 U.S. at 490); rather, the majority acted as a mere "judicial echo of the Board's conclusion" (340 U.S. at 491).

The court of appeals' misapplication of the substantial evidence standard is particularly obvious in the majority's treatment of the preelection threat issue. First, the majority does little more than quote the Hearing Officer's analysis of the conflicting testimony regarding this matter and concludes that "we cannot

say that the record fails to support his conclusion that the election was not prejudiced by [Hall's] threats of violence" (App. A, p. 10a). Second, the majority's reliance upon patently erroneous and irrelevant facts wholly undermines its conclusion that substantial evidence supports the Board's determination. Thus, the majority stresses the Hearing Officer's finding that Hall was not the Union's representative (App. A, p. 10a), and its own finding that Tubbs was unable to recall whether his vote had been influenced by Hall's threats (*supra*, p. 13). However, since the Board, in adopting the Hearing Officer's recommendations, never reached the issue of the Union's responsibility for Hall's actions (App. D, p. 37a, n. 2; see *supra*, p. 11, n. 10), the issue was not properly before the court and, therefore, totally irrelevant in determining whether the Board's decision was supported by substantial evidence.[18] In addition, the majority's error in citing Tubbs' inability to state whether his vote had been coerced (App. A, p. 6a) is highlighted in Judge Bryan's dissent (App. A, pp. 11a-12a; *supra*, p. 13-15).

Moreover, Judge Bryan's dissent strongly suggests that the majority, in dismissing the matter of Hall's coercion "as merely a matter of credibility" and endorsing the Hearing Officer's credibility resolutions, failed to make an independent examination of the Hearing Officer's "amazing determinations"—subse-

[18] In any event, that Hall's conduct was properly attributable to the Union is established by other courts' rulings in similar situations. *See*, e.g., *N.L.R.B.* v. *Urban Telephone Corp.*, 499 F.2d 239, 242-243 (7th Cir. 1974); *Home Town Foods, Inc.* v. *N.L.R.B.*, 379 F.2d 241, 244 (5th Cir. 1967); *N.L.R.B.* v. *Smith Industries, Inc.*, *supra*, 403 F.2d at 896.

quently adopted by the Board—in order to ascertain whether such determinations were supported by substantial evidence. Judge Bryan concludes from his review of the record that Hall was an inherently unreliable witness, and that substantial evidence did not support the Board's toleration of Hall's threats against employees Tubbs and Doss.[19]

Further indicative of the majority's misapplication of the substantial evidence standard are various other factual errors embodied in the opinion below. Thus, for example, the majority clearly misconstrues the Regional Director's findings regarding the Union misrepresentation issue (compare App. A, p. 3a, n. at 4a and App. H, p. 86a; see *supra* p. 21, n. 17), as well

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[19] Judge Bryan specifically noted that Hall never denied that he made the remarks attributed to him by Tubbs. (App. A, p. 16a).

> Hall did not deny before the Hearing Officer that he had made these remarks to Tubbs. He makes the point that he never "threatened" Tubbs. His is a confession and avoidance, lightly tossing it off as something not to be taken at all seriously—just jesting.

Judge Bryan further observed that (App. A, pp. 12a-13a)

> [t]he evidence quite starkly discloses that Hall just before the election doggedly hounded and bullied these two employees into a state of intimidation lest they oppose his wishes. This insufferable intrusion upon the privileges of the participants in a secret balloting, however, occasioned the Board no serious reflection. It consoles itself in the conviction that what Hall did was all in good fun. Without even a hint of the unlawfulness of the acts imputable to Hall, his testimony is accepted, theirs rejected, all because Hall "favorably impressed me [the Hearing Officer] on his demeanor as a general credible witness" in testifying.

as the Board's ruling on the Hearing Officer's conflict of interest.[20] Both these errors would presumably have been obviated by an independent review of the record. The majority, nonetheless, holds that "[w]e see no error of fact or law, or lack of substantial evidence to support these findings" (App. A, p. 3a, n. at 5a).

CONCLUSION

For the foregoing reason, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[20] As to this issue, the Board found that the Hearing Officer's refusal to disclose his union membership was proper since such "inquiry is irrelevant to this proceeding" (App. D, p. 37a, n. 1). The majority, however, incorrectly embellishes this ruling by stating that the "Board also ruled that the Hearing Officer did not have an interest in the litigation merely because he might have belonged to the same union as one of the witnesses who appeared before him" (App. A, p. 3a, n. at 5a).

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 75-1496

ABBOTT LABORATORIES,
ROSS LABORATORIES DIVISION,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for Review of an Order of the National Labor Relations Board.

Argued November 11, 1975, Decided Mar. 31, 1976

Before CLARK,* Associate Justice, BRYAN, Senior Circuit Judge, and WINTER, Circuit Judge.

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* Associate Justice, Supreme Court of the United States, retired, sitting by designation.

WINTER, Circuit Judge:

Abbott Laboratories (the Company) petitions to set aside an order of the Board finding that it violated § 8(a)(5) and (1) of the Act by refusing to bargain with the duly certified representative of its employees (Textile Workers of America—the Union), and the Board cross-petitions for enforcement. The Company does not dispute that it refused to bargain; its defense is one of vitiating irregularities in the representation election and proceedings in which the Board rejected the Company's objections to the election. Because we are not persuaded that there were prejudicial defects in the representation election or procedural defects in the Board's rejection of the Company's objections, and because we are persuaded that the Board's resolution of the factual issues arising out of the representation election is supported by substantial evidence, we grant enforcement.

I.

The election was held on July 20, 1973, at the Company's plant in Altavista, Virginia. After challenges were resolved, the Union prevailed by a vote of 22 to 20.

The Company filed nine objections to the election. The charges were investigated and the Board adopted the Regional Director's recommendation that a hearing be held on four objections and that the remaining objections be overruled. A hearing was held and the hearing officer recommended that these four objections also be overruled and the Union certified. The Company filed exceptions to these recommendations and to certain procedural rulings made by the

hearing officer. Besides attacking the hearing officer's findings in general and his credibility resolutions in particular, the Company excepted to the hearing officer's refusal to receive posthearing briefs and his refusal to disqualify himself on the basis of an alleged conflict of interest arising from the hearing officer's refusal to disclose his membership (or lack thereof) in the NLRB Union. The exceptions were rejected by the Board and the Union certified on October 22, 1974. The refusal to bargain followed promptly thereafter and the unfair labor practice proceeding was begun on November 6, 1974.

Before us, the Company presses substantially all of the objections that it submitted to the Board. It asserts that the Board improperly overruled certain of its objections without a hearing, that there was lacking substantial evidence to overrule the objections as to which a hearing had been held, that the Board's hearing officer improperly denied the Company the right to file a brief, and that the Board's hearing officer should have disqualified himself because his possible membersh in a union which admittedly had no interest in the litigation before him might nevertheless have led him to lack objectivity in judging the conduct of a Board agent who was a member of that union.

We see no merit in any of the arguments made to us and we think that they need not be discussed in detail.* In deference to our dissenting brother,

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* Besides asserting that the Union threatened employees with physical violence, the Company argues that the Union falsely accused the Company of planning reprisals if the Union won the election. The Board found that the Company

had ample opportunity to rebut any false accusations about its own plans. The Company argues, second, that the Union engaged in improper electioneering between the morning and afternoon voting sessions. The Board found that pro-Union employees' forecasts of victory would have been regarded as mere puffing and did not imply access to inside information. The Company next asserts that the Union threatened employees with loss of employment if they did not become members of and support the Union. The Company produced no evidence on this objection, and the Board deemed it to have been abandoned. The Company's fourth argument is that an official Board notice of election was defaced so as to benefit the Union. The Board found that the defacing of the election notice was an isolated, individual prank, and that any prejudice could easily have been remedied by the Company. Next, the Company contends that the Union had misrepresented a contract which the Union had negotiated with another employer. The Board found that there was no misrepresentation, since the Union *had* participated in the claimed negotiations, and failure to disclose the fact that other unions had played a dominant role in the bargaining was not a material omission. Sixth, the Company argues that the Board's agent conducting the election had made improper remarks to eligible voters. The Board found that any improper remarks were not prejudicial, since they were not made within the hearing of anyone who had not yet voted, and were not so extreme as to justify setting aside the election in the absence of prejudice on the theory that they destroyed the appearance of the Board's impartiality. The Company's seventh assertion is that there had been improper conduct at the polling place by one of the Union's observers. The Board found that it was not improper for the observer to stand rather than sit. With regard to the Company's eighth argument that the marking of one ballot was visible as it was being deposited in the official ballot box, the Board found this occurrence to be an isolated accident which had no effect on the election.

With respect to proceedings before the hearing officer, the Board ruled that its hearing officer was not required,

however, we will discuss the Company's contention that the election should be set aside because representatives of the Union threatened physical violence to the Company's employees if they did not vote for and support the Union.

II.

The contention that the Union threatened employees with physical violence, thereby vitiating the election, rests solely on disputed testimony about statements made by Cecil Hall. Hall was a Company employee who was an active Union advocate and one of three employees who informally acted as a liaison with the Union's official representatives.

There was testimony at the representation hearing that Hall, on three separate occasions, threatened to beat up employee Frederick Tubbs if Tubbs did not vote for the Union, and that, on one occasion, Hall threatened to kill or beat up employee Gerald Doss if Doss did not discontinue his work against the Union.

According to Tubbs, Hall's first statement to Tubbs was made during May or June, 1973, at a meeting of Company employees at Leesville Dam. Hall asked Tubbs if Tubbs was for the Union. When

either by statute or the due process clause, to accept post-hearing briefs since the parties had the opportunity to express their views in writing both before and after the case was referred to the hearing officer. The Board also ruled that the hearing officer did not have an interest in the litigation merely because he might have belonged to the same union as one of the witnesses who appeared before him.

We see no error of fact or law in these rulings, or lack of substantial evidence to support these findings.

Tubbs replied affirmatively, Hall said "if I [Tubbs] did not vote for the union he was going to throw me in the lake." The next statement was made in early July, about two weeks before the election, at Wayside Park. Again Hall asked Tubbs if he was "still for the union," and when Tubbs answered "yes," Hall said "if you don't vote for the union, I am going to kick your ass." About a week later, at the time clock where employees punched in, Hall again said to Tubbs, "If you don't vote for the union, I am going to kick in your damn ass." Tubbs did not take Hall's first comment seriously; the second caused him some pause; and the third convinced him that Hall meant what he said. Tubbs was unable to say, however, whether his vote in the representation election had been influenced.

Hall's statement about Doss was made to Wayne Crews some time before the election. Hall said that he would like to "kill" Doss, who was engaged in counter-organizational activities, but immediately added that he would not want to kill him but "just . . . to beat the hell out of him." Crews relayed the statement to Doss.

Hall denied the statements to Tubbs were threats or were more than jokes not intended to be taken seriously. He denied making the statement about Doss. Although Tubb's testimony about what Hall said was corroborated by other witnesses, there was in fact no physical violence and Tubbs continued to attend Union meetings and made no effort to avoid Hall.

The Company sought to impeach Hall by showing the inconsistency between his testimony in which he

admitted threatening Tubbs in jest and an affidavit that he gave a Board representative in which he denied that he threatened anyone, and on the basis of his convictions some twenty years before for theft and escape.

The hearing officer recited and analyzed the evidence pertinent to the Tubbs and Doss threats. He noted that with respect to Hall the evidence was in conflict, and then stated:

> With respect to the alleged threats made to Tubbs, it is clear that these alleged statements were made at voluntarily attended pro-union meetings and although Tubbs admitted that he considered the first threat to be in jest, he began to consider it more seriously when the alleged threat was renewed 2 weeks prior to the election. In spite of this subjective reaction, Tubbs was not deterred from attending additional union meetings and he even attended the union's victory party after the election. Tubbs was also the recipient of the sum of $11, which was loaned to him by pro-union employees to assist him in paying a fine. Such actions are inconsistent with any attempt to show an atmosphere of fear and coercion. Moreover, Tubbs disavowed two affidavits which he read, swore to under oath and gave to Board Agents conducting the investigation of objections and this in itself creates a very serious question as to his credibility. Noting also the inability of Wayne Crews in his testimony to recall Tubbs' reaction to the threat about being kicked into the lake at Leesville Dam at a time when Tubbs himself readily admitted that he laughed at this alleged threat and further noting the demeanor of the

witnesses, I do not credit the testimony of either Tubbs or Crews concerning the alleged threats to Tubbs. On the other hand, I do not credit the version of Cecil Hall who favorably impressed me on his demeanor as a generally credible witness. His admitted remark to Tubbs was clearly made in jest and prompted by the apparent threat Jim Pruett made to Tubbs [to kill him if he voted *for* the union]. Under a well established legal principle the board does not permit a wrongdoer to profit from the illegal act of its agent, but more significantly, in this context Hall's one remark to Tubbs was made in jest and in such a posture had no effect upon the election and objections based thereon should be overruled. (Footnotes omitted.)

In regard to Doss, the hearing officer reported:

> With respect to the testimony of Gerald Doss, it is clear that Hall never directly threatened him and that after hearing the alleged threat secondhand, from employee Wayne Crews, Doss clearly indicated that he was not frightened and that the remark had no effect upon the way he voted. There was no evidence to show that this alleged threat received wide circulation or that the employee who was the recipient of the alleged threat was affected in any way by this alleged misconduct in the casting of his ballot at the polls. (Footnote omitted.)

The hearing officer's conclusion and recommendation, subsequently adopted by the Board, was:

> Based on all of the foregoing and noting particularly that the entire critical period prior to the conduct of the election was totally free from any actual physical violence or property damage

> and that the employees who allegedly made coercive statements were not officers or agents of Petitioner [the Union] or so closely associated with Petitioner as to warrant other employees into believing that they had authority to act for it and that there was no evidence to establish that the Petitioner or any of its agents ever authorized, ratified or condoned any coercive conduct, I find that Employer's Objection No. 1 [threats of physical violence] does not raise substantial or material issues with respect to conduct affecting the results of the election. (Footnote omitted.)
>
> . . . .
>
> . . . it is recommended that [this] objection be overruled . . . [and] that a Certification of Representative issue.

III.

As we review the record, this is a case in which a determination of whether there were such threats of physical violence as to justify setting aside the election depends largely on the resolution of conflicting testimony based upon the credibility of the witnesses. Credibility is an issue for the hearing officer; and especially when it depends largely on observation of the witnesses' demeanor at the hearing, its resolution by the hearing officer will not be overturned. NLRB v. Walton Mfg. Co., 369 U.S. 404, 408 (1962); NLRB v. Lester Bros., Inc., 301 F.2d 62, 68 (4 Cir. 1972). Certainly the hearing officer's determination will not be upset by a mere head count of how many witnesses testify to each of two conflicting versions of an event, *cf.* NLRB v. Union Carbide Caribe, Inc., 423 F.2d 231, 233 (1 Cir. 1970), particularly when some of the wit-

nesses supporting the version having numerical superiority are contradicted either by others who support the same ultimate fact or by their own prior statements. Hall's prior criminal record of twenty years earlier did not require that he be disbelieved, *cf.* Rule 609(b), Fed. Rules of Evidence, although Tubb's very recent conviction for assault and battery could be deemed to undermine his persuasiveness.

Affording the hearing officer's credibility determinations the respect to which they are entitled, we cannot say that the record fails to support his conclusion that the election was not prejudiced by threats of violence. Hall was not the Union's representative; he had no official position with the Union; nor was he on its payroll. The record is lacking in evidence that the Union authorized any of Hall's statements, or that it was aware of them and failed to disavow them. More importantly, the record does not show a general atmosphere of fear and coercion so as to render improbable employee free choice in voting. Admittedly Hall did not always express himself in polite language and he had resort to hyperbole; but in an industrial setting, his choice of language was not uncommon nor would it be expected to have a coercive impact. NLRB v. Bostic Division, USM Corp., —— F.2d —— (6th Cir. 1975); Scoville Mfg. Co. v. NLRB, 443 F.2d 358 (4 Cir. 1971).

ENFORCEMENT GRANTED.

Albert V. Bryan, Senior Circuit Judge, dissenting:

The election resulted in so close a tally—22 to 20—in favor of the Union that the misconduct of the Union's electioneering deserves uncommon scrutiny.

The fair thing, of course, would be for the Board to order a new election—a solution not to be feared by the Union or the Company—but the Board * refused.

Predominantly suspect is the behavior of employee Cecil Hall, a Union contact man and organizer, in his incessant strong arm threats of physical reprisal directed particularly to two co-employees, Frederick Tubbs and Gerald Doss, if they did not vote for the Union. Notably, had either of them been allowed to express his preference in the election, a privilege granted by law, the result would have been a tie and defeat for the Union.

That there was a denial of this right is squarely proved by the following colloquy of the Hearing Officer and Tubbs, who was browbeaten by Hall to vote for the Union and thus gave victory to the Union:

> "HEARING OFFICER: Did Mr. Hall's comments affect the way you voted?
>
> WITNESS: I believe so.
>
> HEARING OFFICER: How would it affect?
>
> WITNESS: It could have. Because I did not know—I could not make my mind up. I was scared.
>
> * * * *
>
> "HEARING OFFICER: Let me return to the point that I was trying to establish. Did the comments that Mr. Hall made to you affect the way you voted? Did you vote the way you in-

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* Since the Board adopted all of the findings of the Hearing Officer, the latter's rulings are frequently spoken of *infra* as the Board's.

tended to vote when you went into the voting place, the polling area?

WITNESS: No, sir, I did not.

HEARING OFFICER: You did not vote the way you wanted to?

WITNESS: No, sir. I thought about it. He done told me three times before the election that he was going to do something to me and so I started not to vote either way. I started not to vote either way and then I figured that I had to vote one way so I went in the booth and I came out and then I went back in again and made my mark.

* * * *

"HEARING OFFICER: Did Mr. Hall's comments to you threatening to throw you in the lake and threatening to kick you ass, did that affect the way you voted. Were you persuaded to vote for his position?

WITNESS: Yes, I would say so."

The majority opinion quite justly notes that the second threat of Hall gave Tubbs pause and the third convinced him of Hall's intentions.

I dissent from the insistence of the Board to approve the election in the face of this proof. The evidence quite starkly discloses that Hall just before the election doggedly hounded and bullied these two employees into a state of intimidation lest they oppose his wishes. This insufferable intrusion upon the privileges of the participants in a secret balloting, however, occasioned the Board no serious reflection. It consoles itself in the conviction that what Hall did was all in good fun. Without even a hint of the unlawfulness of the acts imputable to Hall, his testimony is accepted, theirs rejected, all because Hall "favorably impressed me [the Hearing Officer] on his demeanor as a generally credible witness" in testifying. Decision is rested upon the overworked refuge of the Board: that it is the final judge of credibility.

Now the Court, too, dismisses the issue as merely a matter of credibility. But exploration is demandable, I think, to ascertain whether "substantial evidence" gives the Board's pronouncement such stature. The search is not satisfied by the Board's ipse dixit; the answer is for the Court; indeed, the Court *must* press the inquisition. Universal Camera Corporation v. National Labor Relations Board, 340 US 373, 488, 491 (1951). This quest will reveal the Board's amazing determinations.

Beyond peradventure Hall represented the Union. It looked to him as one of the leaders of the organization campaign in the plant and as its conduit for reports and directives. His voice was the Union's, as the employees generally recognized. Later he was to be the Union observer at the ballot box.

Not only did he speak with the authority of the Union but he spoke with the force of the bearer of two felony convictions—one in 1950 for breaking and entering a store in the nighttime, with the theft of $50.00 worth of cigarettes, and another for grand larceny of an automobile. Presently, the Hearing Officer casually shrugged off this record, commenting that "such offenses do not relate to crimes involving physical violence"; the Court now treates it as insubstantial since the crimes were committed 20 years before.

Actually Hall served 12 years, not being released until December 1961. Furthermore, it is significant that even his prison record was not exemplary and bears recall when his bent for crime surfaces again. Hall escaped from the five-year imprisonment on the breaking and entering sentence; while a fugitive he stole the automobile; on two occasions his parole was revoked, once in 1954 and then in 1957; and he was returned to prison each time. I put down Hall's criminality as something more than a peccadillo; I call it downright vicious violence. Also, he would seem to be a somewhat menacing fellow employee. The majority quite candidly can only say, with faint mitigation for him, that his record "did not *require* that he be disbelieved". On the other hand, it says, a recent conviction of Tubbs for assault and battery "could be deemed to undermine [the] persuasiveness" of him as Hall's accuser. This contrast in weight given the two records will not survive the facts.

The felony convictions were played down by the Hearing Officer, in redemption of Hall, while the conviction of Tubbs for assault and battery was played up, to impair Tubbs' truthfulness. It is clarifying to find that his assault and battery must have been quite slight for the sentence was 18 days. Moreover, he was allowed to serve it during six weekends. Verily, the difference in treatment of Hall's felonies and Tubbs' offense is to "strain at a gnat and swallow a camel."

Hall, in the weeks immediately preceding the election on July 20, 1973, as the majority opinion fully recites, repeatedly threatened employee Frederick Tubbs to "kick [his] ass" if he did not vote for the Union. This meant in plant language, Tubbs ex-

plained under oath, "to get to you and work you over and things. They would beat you up". About the same time, as he watched employee Gerald Doss act counter-union, Hall said, "I would like to kill the son of a bitch" and continuing said, "No he wouldn't want to kill him, I would just like to beat the hell out of him". This remark was repeated to Doss through employee Crews.

The Company complained to the Regional Director to set aside the election for Hall's duress of the voters and other unlawful tactics at the polls. Before Tubbs was interviewed by the Director's agent, Tubbs was admonished by Brumfield, another contact man of the Union's regional vice-president, not to relate Hall's threats since it would "mess up" Hall. Thereafter, Tubbs resigned his job in the plant to take a janitorial job with the Company. On meeting him later, Hall shook his fist at Tubbs, telling him that he was now without protection, and "kept coming around" and "calling me [Tubbs] a rat and a two-timer".

Great stress is laid by the Hearing Officer—to impair Tubb's veracity—upon two affidavits he filed with the investigating agent on August 8, 1973. In one he stated that he was never threatened by Hall and a supplementary affidavit of September 13, 1973 said that he had not told Doss that Hall had threatened Tubbs. Unfortunately the inducement of these affidavits is not mentioned. They were prompted by the statement of Hall to him a week after the election, in substance, that if anybody said that Hall had threatened somebody and could not prove it, they could be sued for slander. This obviously frightened

Tubbs and generated his denials in the affidavits just mentioned.

Moreover, on November 9, 1973, prior to the hearing before the Hearing Officer, Tubbs went to his employer and explained the falsity of his affidavits, the reason why he had made them and gave a full statement in affidavit form on November 9, 1973 reciting the entire story. He even went to Washington, D. C. to correct these earlier denials of Hall's threats.

On his return, Tubbs was faced by this same Brumfield, the Union's contact man who had learned of his trip, with a warning that the "boys" were mad at Tubbs and more so at Crews, the latter also having been noticed giving testimony against Hall. Furthermore, Hall asked him at the plant, "Why did you [correct your statement] because I ain't bothering you but I could. I could do it mighty quick". All of this indicates Hall's unrelenting pursuit of him and why his first two affidavits cannot be taken as affecting his credibility before the Hearing Officer.

Hall did not deny before the Hearing Officer that he had made these remarks to Tubbs. He makes the point that he never "threatened" Tubbs. His is a confession and avoidance, lightly tossing it off as something not to be taken at all seriously—just jesting. As the majority now quite accurately frames it: "Hall denied that his statements to Tubbs were threats or were more than jokes not intended to be taken seriously." Astonishingly, this is seized upon by the Board as expiation cleansing him of any wrongdoing. Feeble indeed is another excuse for him: there was no physical violence. Did there have to be body blows

in order to constitute coercion? To cap it all, before the hearing, Hall had sworn to a Board representative in an affidavit that he did not tell Tubbs he would kick him if he did not support the TWUA [the Union]." Yet he is accorded unqualified belief by the Board.

Tubb's accusations were "corroborated by other witnesses", the majority observes, but then it presses against him, as inconsistencies, the circumstances of his continuance in attendance at Union meetings and his failure to avoid Hall. To me these incidents indicate, rather, the depth of Tubb's conviction of the gravity of Hall's threats, and his fear of the consequences should he cross Hall. The fact that he borrowed $11.00 from some of the Union members to pay a fine is also adduced as an inconsistency, but I miss the point of it. A loan while in such straits would be readily accepted by anybody.

Complete freedom to express their preference in an election of this kind is guaranteed by law to all the employees. This privilege is entrusted to the Board for assurance of its protection, but here the Board tolerates a gross deprivation of the right. As a minimum restoration, a new election should be ordered.

ADDENDUM

After the opinions in this case were prepared and circulated within the court, but before they were filed, a suggestion for rehearing in banc and a request for a poll was made *sua sponte* within the court. A majority of the judges eligible to vote voted to deny rehearing in banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

March 31, 1976

CLERK'S MEMORANDUM

In compliance with Rules 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case No. 75-1496 was entered this date. A copy of the Court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

WILLIAM K. SLATE, II
Clerk

APPENDIX C

217 NLRB No. 117 FJP

D-9718
Altavista, Va.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 5—CA-6969

ABBOTT LABORATORIES
ROSS LABORATORIES DIVISION

and

TEXTILE WORKERS UNION OF AMERICA, AFL-CIO

DECISION AND ORDER

Upon a charge filed on November 6, 1974, by Textile Workers Union of America, AFL-CIO, herein called the Union, and duly served on Abbott Laboratories, Ross Laboratories Division, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 5, issued a complaint on December 4, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on October 22, 1974, following a Board election in Case 5—RC-8530 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about October 30, 1974, and at all times thereafter, Respondent has refused and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 11, 1974, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint and raising affirmative defenses.

On January 7, 1975, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 13, 1975, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause entitled

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[1] Official notice is taken of the record in the representation proceeding, Case 5—RC—8530, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F. Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

"Reply in opposition to motion to the Board for Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Jurgment

In its answer to the complaint and response to the Notice to Show Cause, Respondent, in effect, disputes the representative status of the Union because of errors it alleges occurred in the denial of hearing on certain of its objections and in the rulings and findings of the Hearing Officer at the hearing on the rest of its objections which deprived Respondent of due process.

Our review of the record herein, including that of representation Case 5—RC-8530, reveals that following a Stipulation for Certification Upon Consent Election an election was held on July 20, 1973, which the Union won after, upon agreement of the parties, the challenged ballots were opened and counted. The Respondent filed timely objections to conduct affecting the results of the election alleging, in substance, that the Union threatened loss of employment and violence to the persons and property of employees, created fear among the employees, engaged in improper electioneering, and made misrepresentations; that official NLRB notices were marked and defaced so as to benefit the Union; and that, during the time the polls were open, the security of the ballots was

not maintained, the union observer engaged in conduct disruptive of the appearance of neutrality, and the Board agent engaged in conversation and remarks prejudicial to the Employer in the presence of eligible voters.

On September 23, 1973, after investigation, the Regional Director issued a Report on Objections and Challenges recommending that Respondent's objections be overruled as they did not raise substantial or material issues and that the Union be certified. Respondent filed with the Board exceptions to the Regional Director's report and a brief in support thereof requesting a hearing. Thereafter, the Respondent filed with the Regional Director a Motion for Reconsideration based on an additional statement corroborating, and in support of, its objections. In a Supplemental Report on Objections and Denial of Motion for Reconsideration, the Regional Director denied reconsideration. Respondent then filed exceptions thereto with the Board again requesting a hearing on its objections.

The Board on January 16, 1974, issued its Decision and Order in which it adopted the Regional Director's ruling and recommendations in the report and supplemental report with the modification that it found the issues raised in the objections concerning threatened violence, marked and defaced NLRB official notices, Board agent remarks, and union observer conduct could best be resolved in a hearing. After 3 days of hearing, the Hearing Officer on April 4, 1974, issued his Report and Recommendations on Objections in which he found the objections did not raise substantial and material issues with

respect to the election and recommended that they be overruled, and that, as the Board had previously overruled the other objections, the Union be certified.

Respondent filed with the Board exceptions, a brief, and a motion for oral argument wherein it alleged that its exceptions involved novel and substantial questions concerning Board law and policy. Respondent excepted to the Hearing Officer's findings especially with respect to credibility resolutions and conduct of the union observer and remarks of the Board agent during the polling. Respondent further argued that the Hearing Officer deprived it of a fundamental and substantive right by refusing to receive briefs and prejudiced its right to a fair and unbiased hearing by refusing to state whether he or counsel for the Regional Director was a member of, or represented by, the NLRB union and his subsequent failure to disqualify himself and counsel for the Regional Director for that reason. Respondent also contended that the Hearing Officer erred by quashing a *subpoena duces tecum* requesting certain materials from the Regional Director's file.

The Board, on October 22, 1974, issued its Supplemental Decision and Certification of Representative. After reviewing the Hearing Officer's rulings, it found they were free from prejudicial error and expressly noted that the Hearing Officer properly refused to receive briefs, to require himself and counsel for the Regional Director to disclose whether they were union members, and to delay the hearing to subpoena an investigating Board agent, and that he properly quashed a *subpoena duces tecum.* Then, after considering the entire record, the Board denied the motion for oral argument because the briefs ade-

quately presented the issues and positions of the parties, adopted the Hearing Officer's recommendation that the objections be overruled in their entirety, and certified the Union.

Respondent in its answer to the complaint and response to the Notice To Show Cause claims that the Board wrongfully deprived it of a hearing on some of its objections which were overruled and that it was denied due process because of the Hearing Officer's rulings at the hearing in the remaining objections. As to the objections which were overruled without a hearing, the Board, considering the Regional Director's report and supplemental report, adopted in its Decision and Order the finding that those objections did not raise substantial and material issues. It is well settled that parties do not have an absolute right to a hearing on objections to an election and only when the moving party presents a *prima facie* showing of substantial and material issues which would warrant setting aside the election is it entitled to a hearing. It is clear that this qualified right to a hearing satisfies all statutory and constitutional requirements.[2] With respect to the hearing which was held on the other objections, as indicated above, in the Decision and Certification of Representative, we considered the Hearing Officer's rulings and decided that they were proper and not prejudicial and therefore it is clear that Respondent has not been denied due process.

Since in its response to the Notice To Show Cause Respondent concedes, and it so appears, that all the

[2] *Heavenly Valley Ski Area*, 215 NLRB No. 129 (1974); *Lynden Frosted Foods, Inc.*, 216 NLRB No. 87 (1975).

Respondent's contentions raised in this case have been previously presented to the Board in the underlying representation case, we find Respondent may not relitigate them herein. It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer or adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.[4] We shall, accordingly, grant the Motion for Summary Judgment.

[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] In its answer to the complaint, Respondent denies the allegation that it has failed and refused to bargain with the Union insofar as such allegation alleges that Respondent has a legal obligation to meet and bargain with the Union. Respondent's letter of October 30, 1974, in which it refuses to meet with the Union is appended to the Motion for Summary Judgment and the contents thereof are uncontroverted by the Respondent. Therefore, we find its refusal to bargain to be admitted and true.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of the Respondent

Abbott Laboratories, an Illinois corporation, is engaged in the production of infant formula at its Altavista, Virginia, location. During the preceding 12 months, a representative period, Respondent purchased and received, in interstate commerce, goods and materials valued in excess of $50,000 from points outside the Commonwealth of Virginia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Textile Workers Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All production and maintenance employees employed by the Employer at its Altavista, Virginia, facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, as amended.

2. The certification

On July 20, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 5 designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on October 22, 1974, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about October 28, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 30, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since October 30, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor

practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Abbott Laboratories, Ross Laboratories Division, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A. 5, 1964), cert. denied 379 U.S. 817

(1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Abbott Laboratories, Ross Laboratories Division, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Textile Workers Union of America, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All production and maintenance employees employed by the Employer at its Altavista, Virginia, facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined (illegible) , as amended, constitute a unit appropriate for the purposes (illegible) bargaining within the meaning of Section 9(b) of the Act.

4. Since October 22, 1974, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 30, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, Abbott Laboratories, Ross Laboratories Division, Altavista, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Textile Workers Union of America, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All production and maintenance employees employed by the Employer at its Altavista, Virginia, facility, but excluding all office clerical employees, professional employees, guards, and supervisors as defined in the Act, as amended.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Altavista, Virginia, facilities copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 5, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(c) Notify the Regional Director for Region 5, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C., May 9, 1975.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX

NOTICE OF EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Textile Workers Union of America, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed by the Employer at its Altavista, Virginia, facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, as amended.

ABBOTT LABORATORIES,
ROSS LABORATORIES DIVISION
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 1019 Federal Building, Charles Center, Baltimore, Maryland 21201, Telephone 301—962-2822.

APPENDIX D

FJF
Altavista, Va.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 5-RC-0530

ABBOTT LABORATORIES, ROSS LABORATORIES DIVISION,
Employer

and

TEXTILE WORKERS UNION OF AMERICA,
AFL-CIO, CLC
Petitioner

SUPPLEMENTAL DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to a Stipulation for Certification Upon Consent Election approved on May 22, 1973, an election by secret ballot was conducted on July 20, 1973, under the direction and supervision of the Regional Director for Region 5 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that 42 voters cast ballots, of which 21 were for, and 19 were against, the Petitioner, and 2 were challenged. By agreement of the parties, the 2 challenged ballots were opened, and a revised tally prepared which showed that 22 votes were for, and 20 votes were against, the Petitioner. Thereafter,

the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director conducted an investigation and, on September 26, 1973, issued and duly served on the parties his Report on Objections and Challenges. In his report, he recommended that all 10 objections be overruled and that a Certification of Representative issue. The Employer filed timely exceptions to the Regional Director's report.

The Employer thereafter filed a motion for reconsideration with the Regional Director. The Regional Director denied this motion in a supplemental report on November 29, 1973. The Employer then filed timely exceptions to the supplemental report.

In a Decision and Order dated January 16, 1974, the Board overruled certain of the Employer's objections but directed that a hearing be held for the purpose of receiving evidence to determine the issues raised by Employer's Objections 1, 5, 7, and 8, including whether Cecil Hall was an agent of the Petitioner.

On January 25, 1974, the Regional Director issued a notice of hearing and on January 31, 1974, issued a notice rescheduling the hearing. A hearing was held on March 6, 7, and 8, 1974, before Hearing Officer Joseph V. McMahon.

On April 4, 1974, the Hearing Officer issued and duly served on the parties his Report and Recommendations on Objections in which he recommended that the objections he overruled in their entirety.

Thereafter, the Employer filed exceptions to the Hearing Officer's Report and Recommendations on Objections and a supporting brief, and the Petitioner filed a responding brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the Hearing Officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.[1]

The Board has considered the Hearing Officer's report, the Employer's exceptions thereto, the Petitioner's responding brief, and the entire record in this case and hereby adopts the Hearing Officer's recommendation that the objections be overruled in their entirety.[2] As Petitioner has won the election, we shall certify it as bargaining representative.

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[1] The refusals of the Hearing Officer and counsel for the Regional Director to disclose whether or not they were members of a union was proper as such inquiry is irrelevant to this proceeding. We also find that the Hearing Officer's rulings not to receive briefs, not to delay the proceeding so that an investigating Board agent could be subpenaed, and to quash a *subpoena duces tecum* which sought materials from the Regional Director's file were properly made.

[2] The Employer's request for oral argument is hereby denied as the record and the briefs adequently present the issues and positions of the parties. In agreeing that Objection 1 should be overruled, we rely upon the Hearing Officer's credibility resolutions. See *The Coca-Cola Bottling Company of Memphis,* 132 NLRB 481 (1961). We find it unnecessary to reach the merits of the alleged threats and to assume *arguendo,* as did the Hearing Officer, that the threats were made.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Textile Workers Union of America, AFL-CIO, CLC, and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

> All production and maintenance employees employed by the Employer at its Altavista, Virginia, facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, as amended.

Dated, Washington, D.C., October 22, 1974.

JOHN H. FANNING, Member

HOWARD JENKINS, JR., Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX E

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
FIFTH REGION

Case No. 5-RC-8530

ABBOTT LABORATORIES,
ROSS LABORATORIES DIVISION
Employer

and

TEXTILE WORKERS UNION OF
AMERICA, AFL-CIO, CLC
Petitioner

APPEARANCES:

Louis J. D'Amico, Esq.
Baltimore, Maryland
For the Regional Director—Region 5

Joseph D. Luksch, Esq.
Washington, D.C.
For the Employer

Michael Schnipper, Esq.
New York, New York
For the Petitioner

BEFORE: Joseph V. McMahon
Hearing Officer

HEARING OFFICER'S REPORT
and
RECOMMENDATIONS ON OBJECTIONS

Pursuant to a Stipulation for Certification Upon Consent Election approved by the Regional Director

on May 22, 1973, a secret ballot election was conducted on July 20, 1973, among all production and maintenance employees employed by the Employer at its Altavista, Virginia facility during the payroll period ending May 20, 1973, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

Thereafter, a Tally of Ballots was duly served upon the parties, which showed the following:

Approximate number of eligible voters	42
Void ballots	0
Votes cast for Petitioner	21
Votes cast against participating labor organization	19
Valid votes counted	40
Challenged ballots	2
Valid votes counted plus challenged ballots	42

The challenges affected the results of the election. Pursuant to an agreement of the parties, the two challenged ballots were opened and counted on August 8, 1973 and the revised tally showed that of the two challenged ballots, one was cast for Petitioner and one against. Thus, of the 42 valid votes cast, Petitioner received 22, with no challenged ballots remaining for disposition, and the final tally revealed that a majority of valid votes counted had been cast for Textile Workers Union of America, AFL-CIO, CLC.

On July 27, 1973, the Employer timely filed objections to conduct affecting the results of the election.

Pursuant to the Board's Rules and Regulations, the Regional Director for Region 5 caused an investigation of the objections to be made and thereafter, on September 26, 1973, issued and served upon the parties his Report on Objections and Challenges, in which he recommended that all of the Employer's objections be overruled and that an appropriate Certification of Representative issue. Thereafter, on November 14, 1973, the Employer filed a Motion for Reconsideration to the Regional Director requesting that the Regional Director reconsider his findings and recommendations in that such findings appeared to be erroneous. Thereafter, on November 29, 1973, the Regional Director for Region 5 issued and served upon the parties his Supplemental Report on Objections and Denial of Motion for Reconsideration, in which he viewed the additional evidence submitted by the Employer as insufficient to warrant setting aside the election and denied the Employer's Motion for Reconsideration. Thereafter, the Employer filed timely exceptions to the Regional Director's Supplemental Report.

On January 16, 1974, the Board issued a Decision and Order directing that a hearing be held before a duly designated Hearing Officer for the purpose of receiving evidence to determine the issues raised by Employer's Objections 1, 5, 7 and 8, including whether or not Cecil Hall was an agent of Petitioner. Pursuant to the Board's Order, the above-entitled matter was referred to the Regional Director for Region 5 for the purpose of conducting a hearing and issuing a Notice of Hearing thereon.

Pursuant to the Regional Director's Notice of Hearing, dated January 25, 1974, and his Order

Rescheduling Hearing dated January 31, 1974, a hearing was conducted before the undersigned duly designated Hearing Officer at Lynchburg and Renan, Virginia on March 6, 7 and 8, 1974. The Employer, the Petitioner and the Regional Director were represented by counsel. All parties were afforded full opportunity to be heard, to examine and cross examine witnesses and to introduce documentary evidence relevant to the issues.

Pursuant to the Board's Order directing a hearing and upon the record of the hearing, I make the following resolutions of the credibility of witnesses, findings of fact and recommendations to the Board as to the disposition of the issues:

THE OBJECTIONS

I. OBJECTION NO. 1

A. Employer's Objection No. 1 states as follows:

> During the critical period herein the Petitioner threatened employees of Ross with physical violence to both person and property.

In support of this objection, the Employer presented witnesses who testified concerning certain alleged threats made and the relationship between Cecil Hall and the Petitioner. The alleged threats as developed throughout the record covered the following numbered incidents and series of incidents:

1. Employee Frederick Tubbs testified that during the period between April, 1973 and the day of the election, July 20, 1973, he attended approximately all of the 7 pro-union meetings which were held off

the Employer's premises on the employee's own time. At one meeting during May or June, 1973 he stated that the employees discussed the possibility of "a rat being in the crowd" and on this occasion Cecil Hall turned to Tubbs and asked him if he was for the union; Tubbs replied that he was and then Hall allegedly stated to Tubbs that if he did not vote for the union he was going to throw Tubbs in the lake.[1] Tubbs stated that he laughed at Hall's comment because he did not take him seriously.

Tubbs further testified that approximately 2 weeks prior to the election at another pro-union meeting held at a facility known as Wayside Park, the employees present were talking about "sticking together" and Hall allegedly asked Tubbs if he was still for the union and again Tubbs replied that he was and Hall told him "if you don't vote for the union, I am going to kick your ass." Tubbs stated that he "kind of thought" Hall meant what he said this time.

Tubbs further testified that about a week prior to the election when he was punching his timecard, someone asked him if he was still for the union and he turned to see who it was, Hall was there and allegedly said to him "if you don't vote for the union, I am going to kick you in your damn ass."

In support of the aforementioned alleged incidents of Hall threatening Tubbs the Employer also presented employee Wayne Crews who stated that he attended approximately five of the pro-union meet-

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[1] This meeting was held at a site known as Leesville Dam which is adjacent to a body of water.

ings prior to the election and that at the Leesville Dam meeting in late May 1973 he stated that he recalled a conversation about a "rat in the crowd" and Hall asking Tubbs if he was for the Union and after Tubbs said yes Hall told him "if you ain't with us I will kick your damn ass in the lake." Crews could not recall what Tubbs' reaction to the comment was and when asked specifically if Tubbs had laughed Crews stated that he didn't think so but believes he would have remembered it if Tubbs had in fact laughed. In any event Crews stated that it was his impression that Hall didn't joke much and that everything he said "he said like he meant it." Crews also stated that he was present at the Wayside Park pro-union meeting and that at this meeting Hall turned to Tubbs and said that "if you don't vote for the union, I am going to kick your damn ass." [2]

The Petitioner presented employee Cecil Hall as a witness and he denied ever threatening Tubbs but did state that at the Wayside Park meeting Tubbs made a complaint about one of the supervisor's [3] threatening him about kicking him in the rear if he supported the union and at that point Hall went up to Tubbs, put his hand on Tubbs' shoulder and said "Fred, you are in a world of trouble because Jim is going to kick you if you do and I am going to kick you if you don't." Hall further indicated that both he and Tubbs and others present laughed at this interchange of conversation.

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[2] Employee Gerald Doss also testified that sometime in June, 1973, Tubbs told him that Hall intended to "kick the shit" out of Tubbs if he didn't vote for the union.

[3] Testimony revealed that Jim Pruett was the supervisor in question.

During the course of the hearing Tubbs admitted that the supervisor, Pruett, warned Tubbs that if he voted for the union he would kick him in the ass. He also admitted that pre-union employees raised $11 for him to help him pay a court fine he had; that at union meetings there was always food and beer and those who attended ate and drank together; that after Hall made the second alleged threat at Wayside Park, he still continued to attend the pro-election pro-union meetings. Tubbs also admitted that he was aware that the election was to be by secret ballot and that "nobody was going to know what you marked." He also admitted that he suffered no physical harm by anyone who supported the union prior to the election nor did he observe that Hall took any action which would cause physical harm to any other employee.

Tubbs also admitted that on two occasions after the election and during the NLRB investigation of objections, he told NLRB agents in affidavits given on two separate occasions that he was not threatened by Hall but that he was only threatened by Pruett. At the hearing, Tubbs admitted that he had not told the truth to the Board Agents on those two occasions, although he stated that his impression was that what he told the Board Agents would be kept private.

2. The Employer also presented employee Jesse Moon who stated that during a conversation he had with employee James Ferguson in June, 1973 the union was discussed and Moon stated "that if the union came in and we came to a strike, that I planned to work because I was not for the union."

In response to that statement Ferguson allegedly told him that "that was the way people's windshields and cars got torn up." Employee Ferguson was called as a witness by Petitioner and testified that during the election campaign he talked to Moon about strikes but never threatened him.

A few days after the alleged Ferguson/Moon conversation Moon stated that he told employee David Nichols that he was against the union and that if it came to a strike that he planned to work. At this Nichols allegedly stated that "they were going to stand outside the door and they were not going to let anyone in." Nichols was not called as a witness. Moon [4] admitted however that Nichols did not indicate that he, as an individual, had plans to take any action in the event of a strike.

3. The Employer presented employee David Vaughn who testified that in June, 1973, about a month prior to the election, he was approached by Cecil Hall and asked whether he would join the union and after Vaughn said no, Hall allegedly stated that "if the Union did not come in, that he did not want to work with any yellow-bellied sons of bitches who did not want to vote for it." Vaughn stated that his impression was that Hall was just stating his feelings when he made that comment. Vaughn further indicated that the alleged comment did not affect the way he had voted.

4. The Employer also presented Gerald Doss as a witness who testified that he was told by Wayne

[4] Moon conceded that he was active in being anti-union and initiated a petition among employees in an effort to stop the election.

Crews in early July, 1973 that he had better watch himself because Hall was out to get him. Crews allegedly told Doss that Hall, in a direct reference to Doss, stated "that he woud like to kill the son of a bitch" and after a pause added that "no, he would just like to work him over real good." Doss admitted that Hall never directly threatened him or caused him any physical harm and that he was not frightened after hearing the remark attributed to Hall and further that it had no affect upon the way he voted. Doss also admitted that when he was asked on August 8, 1973, by an NLRB agent about the incident, he could not even recall who told him about the threat Hall allegedly made.

In further support of this incident the Employer presented Wayne Crews who stated that Hall approached him at work about 2 weeks prior to the election and began to talk about Doss campaigning against the union and it was on this occasion that Hall allegedly directed the aforementioned comment against Doss. In rebuttal Hall testified that he never threatened Doss at any time.[5]

In addition to the above numbered incidents the Employer submitted several witnesses who testified that it was their impression that Hall was the chief inside organizer and the chief proponent for the union. In this connection, the evidence presented at the hearing revealed that Hall had been employed by the Employer as an electrician for approximately one year prior to the start of the union's campaign in April, 1973. After the campaign began

[5] Hall also indicated that he had known Doss for close to 30 years.

Hall openly let employees know that he strongly favored the union. Hall signed a union card and admitted that he had encouraged other employees to sign union cards.[6] During the course of the campaign Hall maintained telephone contact with the Petitioner's representative at a frequency of once every 3 weeks and a more frequent telephone contact with the Petitioner's office.

Hall possessed no official designated capacity within the organization of the Petitioner; he was not appointed to be a spokesman for Petitioner or authorized to act on its behalf. Hall and two other employees were most frequently in contact[7] with the Petitioner's representative Wayne Dernoncourt, the vice-president and Upper South Director for the Petitioner.

The organizing campaign was controlled by Dernoncourt who admittedly is an agent of Petitioner and belongs to a paid staff of union organizers. Dernoncourt attended approximately five of the pro-union meetings and in his absence no employee of the Employer was designated to act on his behalf. No employee of the Employer was paid any money

[6] Hall admits to asking some employees to sign union cards but indicated that the cards were handed in to the union individually by the card signers and not by him.

[7] In the Regional Director's report it was noted that both Cecil Hall and Acie Brumfield were elected by pro-union employees to be contact men between the Petitioner and employees. The record does not establish such a conclusion in that there was no election and no position officially referred to as "contact man." The three employees contacted for the purpose of setting up meetings or discussing problems were Leonard Wills, Acie Brumfield and Cecil Hall.

by Petitioner or reimbursed for any expense connected with the union campaign.

It is undisputed that Hall[8] was strongly in favor of the union; that he attended most, but not all, of the pro-union meetings and that he acted as one of the union's observers during the conduct of the election.

B. *Analysis and Conclusion*

In its memorandum of law submitted prior to the close of the hearing, the Employer contended that the alleged threats herein were of the type which represented classic violations of Section 8(B)(1)(A) of the Act and as such constituted a basis for setting the election aside. The Board has held that the party raising such a contention has the burden of proof in establishing that the alleged threats were made through the accountability or responsibility of the union involved and that labor organizations shall be held responsible for the conduct of their agents and that the common law of agency should apply and, further, that the burden of proof goes both to the existence of the agency relationship as well as to the nature and extent of the agent's authority.[9] Accordingly, the issues raised by Objection No. 1 are whether an agency relationship existed between Hall and the Petitioner and between other employees and the Petitioner and to what extent these alleged threats may have affected the outcome of the election.

[8] The Employer also brought forth the fact that Hall had a criminal record and served time in jail but it was further noted that such offenses did not relate to crimes involving physical violence.

[9] *Sunset Line and Twine Company*, 79 NLRB 1487.

With respect to agency, the record reflects that Hall was an active pro-union advocate who attended most union meetings; signed a union card; asked other employees to sign union cards; served as the union's observer at the election; and also served as one of three informally selected employees for the purpose of maintaining telephone contact with the Petitioner's representative in connection with setting up union meetings and other related campaign efforts. It appears clear that Hall was not and did not act as an official representative of the union but rather served as an enthusiastic volunteer who, along with other employees, acted as a liaison man between pro-union employees and the Petitioner. In so doing he received no benefit or remuneration from Petitioner and had no authority to speak for the Petitioner. Moreover, there is no evidence to show that Hall ever openly presented himself as the Petitioner's representative but rather his actions were limited to expressing his pro-union views openly to other employees and to attempting to persuade other employees to share his sentiments. The Board has held that such union advocacy by a rank and file employee does not make that employee an agent.[10] The Board has also held that agency status is not established by the factors that an employee acted as a liaison between the union and employees and maintained frequent telephone contact with union officers.[11] Accordingly,

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[10] *Poinsett Lumber and Manufacturing Company,* 107 NLRB 234; *Urban Telephone Corporation,* 196 NLRB 23; *Bond Allen, Inc.,* 100 NLRB 216.

[11] *Petroleum Distributing Company, Inc.,* 208 NLRB No. 112.

I find that at all times material herein, Hall was not an agent of Petitioner.

Viewing now the context of the statements attributed to Hall, there arises substantial conflict in the testimony concerning these threats. With respect to the alleged threats made to Tubbs, it is clear that these alleged statements were made at voluntarily attended pro-union meetings and although Tubbs admitted that he considered the first threat to be in jest, he began to consider it more seriously when the alleged threat was renewed 2 weeks prior to the election. In spite of this subjective reaction, Tubbs was not deterred from attending additional union meetings and he even attended the union's victory party after the election. Tubbs was also the recipient of the sum of $11, which was loaned to him by pro-union employees to assist him in paying a fine. Such actions are inconsistent with any attempt to show an atmosphere of fear and coercion. Moreover, Tubbs disavowed two affidavits which he read, swore to under oath and gave to Board Agents conducting the investigation of objections and this in itself creates a very serious question as to his credibility. Noting also the inability of Wayne Crews in his testimony to recall Tubbs' reaction to the threat about being kicked into the lake at Leesville Dam at a time when Tubbs himself readily admitted that he laughed at this alleged threat and further noting the demeanor of the witnesses, I do not credit the testimony of either Tubbs or Crews concerning the alleged threats to Tubbs. On the other hand, I do credit the version of Cecil Hall who favorably impressed me on his demeanor as a generally credible witness. His admitted remark to Tubbs was clearly made in jest

and prompted by the apparent threat Jim Pruett made to Tubbs. Under a well established legal principle the board does not permit a wrongdoer to profit from the illegal act of its agent,[12] but more significantly, in this context Hall's one remark to Tubbs was made in jest and in such a posture had no effect upon the election and objections based thereon should be overruled.[13]

With respect to the testimony of Moon concerning the two separate occasions in June, 1973 when Moon announced his strong anti-union feelings to employees Ferguson and Nichols and made it clear that he would work through any strike if the union came in and if there was a strike, I find that, *assuming arguendo*, such statements were made there is clearly no evidence to establish that either Ferguson or Nichols were agents of the Petitioner. It is also clear that the remarks were made in a context that demonstrated that neither Nichols or Ferguson had any intention in any way of acting on these statements. The remarks clearly referred to a hypothetical situation, that is, if, after the union won the election, it called a strike and employees crossed the picket line there could be incidents of property damage or physical restraint. The remarks were clearly unrelated to how employees voted in the election and were merely exchanges of views between employees in the milieu of the work place. The Board has held that under such circumstances these incidents could have no im-

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[12] *General Dynamics Corp.*, 181 NLRB 874.

[13] *Pepsi-Cola Bottling of Brookfield, Inc.*, 199 NLRB No. 74.

pact on the votes cast by the employees,[14] and the alleged statements of these employees could have been properly evaluated.

With respect to the testimony of David Vaughn who was allegedly told by Cecil Hall that if the union did not come in Hall "did not want to work with any yellow bellied sons of bitches who did not want to vote for it, "I find that, *assuming arguendo*, that such a statement was made Vaughn clearly indicated that it was his subjective reaction that Hall was just stating his feelings on the matter. The Board has long held that exaggerations, inaccuracies, half-truths, name calling and minos misstatements, while not condoned, will not be grounds for setting aside an election.[15]

With respect to the testimony of Gerald Doss, it is clear that Hall never directly threatened him and that after hearing the alleged threat second-hand, from employee Wayne Crews, Doss clearly indicated that he was not frightened and that the remark had no effect upon the way he voted. There was no evidence to show that this alleged threat received wide circulation or that the employee who was the recipient of the alleged threat was affected in any way by

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[14] *Head Ski Company, Inc.*, 192 NLRB 217; *The Great Atlantic & Pacific Tea Company, Inc.*, 177 NLRB 942; *Monroe Auto Equipment Co.*, 186 NLRB 90. In any event, were it necessary to make a credibility resolution based on demeanor, I would not credit the testimony of Moon with respect to any alleged threats made to him by either Ferguson or Nichols.

[15] *Georgia-Pacific Corporation*, 199 NLRB No. 43. Moreover, based on Hall's favorable demeanor, I do not credit this witness with respect to attributing this remark to Hall.

this alleged misconduct in the casting of his ballot at the polls.[16]

Based on all of the foregoing and noting particularly that the entire critical period[17] prior to the conduct of the election was totally free from any actual physical violence or property damage and that the employees who allegedly made coercive statements were not officers or agents of Petitioner or so closely associated with Petitioner as to warrant other employees into believing that they had authority to act for it and that there was no evidence to establish

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[16] *Monroe Auto Equipment, supra.* Moreover, based on my observations and the demeanor of the witnesses, I do not credit the testimony of Crews as to this statement and note that Doss was unable to recall who relayed the alleged threat to him during the course of the investigation of the objections at a time proximate to the alleged relating of this threat.

[17] *Goodyear Tire and Rubber Company,* 138 NLRB 453, where the Board in considering objections to an election looks only to evidence of conduct which occurred between the time the petition is filed and the election is held. In this connection, it is noted that evidence of post-election misconduct could have no impact or effect upon the election atmosphere and I so find. In further support of Objection No. 1, the Employer submitted through the testimony of Tubbs and Crews that during the course of the campaign, employees Cecil Hall, Acie Brumfield and Monte Kegly indicated that those who supported the union or attended union meetings would be fired if the union lost the election. No specific instances of such statements were presented and I do not credit either Crews or Tubbs as to whether they were even made. Assuming *arguendo* that such statements were made, it is clear that the union had no authority with respect to discharging employees and employees would be generally capable of recognizing that the union had no such authority. *Rio De Oro Uranium, Inc.,* 120 NLRB 91.

that the Petitioner or any of its agents ever authorized, ratified or condoned any coercive conduct, I find that Employer's Objection No. 1 does not raise substantial or material issues with respect to conduct affecting the results of the election.

II. OBJECTION NO. 5:

A. Employer's Objection No. 5 states as follows:

> During the critical period herein the official NLRB notices of election were improperly marked and defaced by Petitioner and its supporters so as to benefit Petitioner and mislead Ross employees.

In support of this objection the Employer presented two supervisors as witnesses who testified that an NLRB Notice of Election with a sample ballot was posted in the quality assurance laboratory where four eligible employees worked. On the day before the election, one supervisor observed employee Wilson Reynolds use a black felt tip pen and place four dots in each corner of the "Yes" box on the plastic oversheet covering the Notice of Election and this supervisor warned him that it was unlawful to deface the notice. On the next day between polling sessions the same supervisor observed Reynolds use a ballpoint pen and mark an "X" in the "Yes" box on the plastic oversheet covering the Notice of Election and again warned him that it was unlawful to deface the notice. The second supervisor observed that there was an improper marking on the plastic oversheet but neither supervisor took the action of removing the plastic oversheet or reporting the incident to higher Employer authority or reporting the matter to the Board

Agent who was at the Employer's premises on the day of the election.[18]

The record reveals that Reynolds was a supporter of the union but also that he had signed the petition distributed among employees for the purpose of notifying the union that employees were no longer interested in having an election. There was no evidence to establish that Reynolds was an agent of the Petitioner or was acting on the Petitioner's behalf at any time or that the Petitioner condoned or encouraged the misconduct of this employee over which it had no authoritative control.

B. *Analysis and Conclusion*

The credited testimony establishes that on the day before the election and between polling periods on the day of the election, an employee improperly marked the clear plastic oversheet covering one of the NLRB's Notices of Election. It is clear that one of the Employer's supervisors was present at the time the

[18] Based on my observations of the witnesses and their demeanor, I credit the version of the supervisors with respect to the time the notices were marked and I do not credit the testimony of Reynolds or his corroborating witness Denis DeLapp on this point. Reynolds admitted marking the plastic oversheets with the two improper insertions but stated that he made the "X" in the "Yes" box after the polling was over. In an affidavit given to the Board Agent conducting the investigation Reynolds denied ever placing an "X" on the sample ballot and at the hearing explained this apparent inconsistency by stating that his mark was placed not on the sample ballot but on the plastic. Such an obvious attempt at evassiveness does not lend to the credibility of this witness on this point, and accordingly, I do not credit him with respect to the time he marked the notices.

markings were made and I find that he could have, quickly and efficiently, rectified the situation by either simply removing the plastic oversheet or reporting the incident to the plant manager or the Board Agent. I also find that in marking the sample ballot Reynolds was acting on his own as a prankster and an individual and that his improper conduct could not be imputed to either of the parties.

The Board has held that in cases where similar markings were made such defacement was not sufficient to warrant setting the election aside where there was no evidence submitted to any way indicate that the union was responsible for the defacement and further where the evidence shows that no steps were taken to remove the altered notices.[19] In its memorandum of law, the Employer relies upon *Mademoiselle Shoppe, Inc.*, 199 NLRB No. 147, concerning the defacement of notices but that case is clearly distinguishable on the ground that the evidence therein, unlike the instant case, established that an official agent of one of the parties to the election made the defacement.

Based on the foregoing, I find that Employer's Objection No. 5 does not raise substantial or material issues with respect to conduct affecting the results of the election.

III. OBJECTIONS NOS. 7 AND 8:

A. Employer's Objection No. 7 states as follows:

[19] *Keller Dye & Finishing Company*, 184 NLRB No. 54; *Lloyd A. Fry Roofing Company*, 108 NLRB 1297; *Murray Chair Company, Inc.*, 119 NLRB 714 and *P. H. Snow Canning Company, Inc.*, 119 NLRB 714.

> During the time when the polls were opened the Board Agent in charge of the election engaged in conversation and made remarks to the election observers, three of whom were eligible voters which conversation and remarks were prejudicial to the Employer.

Employer's Objection No. 8 states as follows:

> During the time when the polls were open the Board Agent in charge of the election permitted the union election observer to engage in conduct which destroyed the appearance of neutrality necessary to the conduct of a fair election.

In that both of these objections relate to the period when the polls were open and the conduct of the Board Agent and similar issues are involved they shall be considered together.

In support of these objections the evidence presented at the hearing reveals that on Friday, July 20, 1973, the NLRB election was held in the Employer's cafeteria between the hours of 5:30 a.m. and 5:45 a.m. and between the hours of 1:30 p.m. and 2:30 p.m. and that after the close of the second polling period all ballots were co-mingled and counted.

Both the Employer and Petitioner had designated two observers each for the two polling sessions. Prior to the opening of the polls the Board Agent read a list of instructions to the observers and informed them that they could object to any conduct they thought improper.

In the first voting session four eligible employees voted, three of whom were observers; the fourth observer was not in the unit and therefore not eligible to vote. During this first session the Board Agent in-

structed the observers to keep the voting eligibility list face down in that he had previously informed them that observers could not keep a list of those who had voted.

During the course of both polling sessions all observers wore buttons designating them as observers and two of the observers, one for the Employer and one for the Petitioner, were specifically assigned to perform the task of checking names off the voting eligibility list. No observer left the polling area at any time during either polling session.

The record reveals that one of Petitioner's observers, Cecil Hall, requested, and was granted permission from the Board Agent to stand and throughout the course of both polling sessions he did stand while other observers sat. The testimony of all observers establishes that Hall stood in the general area of a coin machine which was adjacent to the observers' checking table and recessed in from the corridor through which eligible employees seeking to vote approached the observer table and the Board Agent. No observer recalled that Hall ever stepped out into the corridor and I credit their testimony in this regard on the ground that as observers they would be most readily able to indicate if Hall did move into the corridor or in front of the observers' table.

The record is clear in establishing that there were no conversations between observers and eligible voters or between the Board Agent and eligible voters during the polling periods.[20]

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[20] It was stipulated that the Board Agent's conversations with observers which were allowed to have contained objec-

The Employer's observers testified that during intermittent periods while the polls were open, observers for both parties engaged in conversations with the Board Agent. In response to a question asked by an Employer observer the Board Agent replied that he was a member of a union and in response to another question he stated that he knew Wayne Dernoncourt, the Petitioner's agent. During these conversations, he is also alleged to have stated he had participated in an election where the counting of ballots was started before the polls were closed; that the union to which he belonged had done something for him and that in addition to knowing Dernoncourt, he had worked with him.[21] It was also alleged that the Board Agent requested that the observers sign the certification of conduct approximately 1 to 3 minutes prior to the close of the polls. It is undisputed that all observers did sign the certification of conduct and that it was signed after all eligible employees had voted and that during the course of the balloting no observer raised any objection to the Board Agent. It is also undisputed that the Board Agent allowed observers to thumb through the voting eligibility list during the second polling period.

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tionable remarks took place only after all the eligible observers had voted and only during the second polling session.

[21] The Board Agent was not called by any party to testify and the testimony of the Employer's observers remains substantially uncontradicted, although the Petitioner's observers testified that they did not hear the Board Agent make a comment about counting ballots before the polls closed.

B. *Analysis and Conclusions*

The record clearly establishes and there is no dispute that Cecil Hall was a known pro-union advocate and that during the polling period in which he served as a union observer he requested and was granted permission to stand rather than sit. The record clearly establishes that he did not engage in any improper conduct or electioneering while serving as an observer and I so find. The Board has long held that the mere presence of a known union supporter serving as an observer is not objectionable.[22] The Board has also held that the identity of election observers, as well as the fact that they represent the interests of the parties, is generally well known to the employees and there is no evidence here that the observer failed to follow any instructions or interfered with the election process in any way.[23]

With respect to the conduct of the Board Agent, the record is clear that, assuming arguendo, he made all the alleged objectionable remarks attributed to him, said remarks were uttered only in the presence of observers who had already voted or who were not eligible to vote and who did not leave the polling area at any time during the course of the election. It is the Board's policy that statements made at a time when they could not have possibly affected the election results will not warrant setting aside an election.[24]

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[22] *Stokely Foods, Inc.*, 81 NLRB 449. It appears that Hall stood to prevent employees waiting to vote from using vending machines which were directly behind him.

[23] *Western Electric Company, Inc.*, 87 NLRB 183; *Larkwood Farms, A Div. of the Pillsbury Co.*, 178 NLRB 226.

[24] *Janler Plastic Bold Corp.*, 208 NLRB No. 37; *Wald Sound, Inc.*, 203 NLRB No. 61, where a Board Agent's remark made

The Board's job is to make reasonably certain that the election reflected the true sentiments of the voters and the election must be appraised realistically and practically and should not be judged against theoretically ideal but nevertheless artificial standards.[25] In its memorandum of law, the Employer cited *Athbro Precision Engineering Corp.*, 166 NLRB 966, wherein the Board set an election aside on the ground that the behavior of the Board Agent, in drinking beer with a union agent between polling sessions, gave an appearance of irregularity to the election and departed from the high standards the Board seeks to maintain. While said conduct has clearly never been condoned, this case is distinguishable on its facts but it is noted, moreover, that the Board vacated its order in that case and later certified the union.[26]

Based on the foregoing, I find that Employer's Objections Nos. 7 and 8[27] do not raise substantial or

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after the ballots had been cast could not have affected the election results.

[25] *The Regency Hyatt House,* 180 NLRB 489.

[26] *Athbro Precision Engineering Corp.,* 171 NLRB No. 4.

[27] I find absolutely no merit in the Employer's contention that the signing of the Certification of Conduct would be a basis for setting aside the election where the record shows that all eligible employees voted prior to the signing of the Certification and where there is a minor dispute among observers as to whether the Certification was signed at the close of the polls or approximately 1-3 minutes prior to the close of the polls. I further find no merit to the Employer's contention that it was objectionable conduct for the Board Agent to allow the observers to freely thumb through the voting eligibility list during the second polling session where the record clearly shows that no observers kept a list of those who voted and no observer left the polling area during that second polling session.

material issues with respect to conduct affecting the results of the election.

RECOMMENDATIONS

Having found that Employer's Objections Nos. 1, 5, 7 and 8 do not raise substantial and material issues with respect to conduct affecting the results of the election, it is recommended that these objections be overruled. Inasmuch as the Board in its Order Directing Hearing adopted the Regional Director's recommendations on overruling the Employer's remaining objections, it is further recommended that a Certification of Representative issue.

As provided in the Board's Order Directing Hearing, any party may within ten (10) days from the date of issuance of this Report file with the Board in Washington, D. C., an original and seven (7) copies of exceptions. Immediately upon the filing of such exceptions, the party filing the same shall serve a copy thereof on the other party and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer and will issue the appropriate Certification.

Signed at Newark, New Jersey, this 4th day of April, 1974.

/s/ Joseph V. McMahon
JOSEPH V. MCMAHON
Hearing Officer
National Labor Relations Board
Twenty-second Region
970 Broad Street
Newark, New Jersey 07102

APPENDIX F

Altavista, Va.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 5-RC-8530

ABBOTT LABORATORIES, ROSS LABORATORIES DIVISION,
Employer
and
TEXTILES WORKERS UNION OF AMERICA,
AFL-CIO, CLC
Petitioner

DECISION AND ORDER

Pursuant to a Stipulation for Certification Upon Consent Election approved on May 22, 1973, an election by secret ballot was conducted on July 20, 1973, under the direction and supervision of the Regional Director for Region 5 among the employees in the appropriate unit. At the conclusion of the election, the parties were furnished with a tally of ballots which showed that 42 voters cast ballots, of which 21 were for, and 19 were against, the Petitioner, and 2 were challenged. By agreement of the parties, the 2 challenged ballots were opened, and a revised tally prepared which showed that 22 votes were for, and 20 votes were against, the Petitioner. Thereafter, the Employer filed timely objections to conduct affecting the results of the election.

In accordance with the National Labor Relations Board Rules and Regulations, the Regional Director

conducted an investigation and, on September 26, 1973, issued and duly served upon the parties his Report on Objections and Challenges. He recommended that all 10 objections of the Employer be overruled and that a Certification of Representative issue. The Employer filed timely exceptions to the Regional Director's Report.

The Employer thereafter filed a Motion for Reconsideration with the Regional Director.

The Regional Director denied this motion in a Supplemental Report on November 29, 1973. The Employer then filed timely exceptions to the Supplemental Report.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner is a labor organization claiming to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The parties stipulated, and we find, that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees employed by the Employer at its Altavista, Virginia, facility, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, as amended.

5. The Board has considered the Regional Director's Report and Supplemental Report and the Employer's exceptions thereto, and hereby adopts the Regional Director's rulings and recommendations with the following modifications:

We find that the issues raised by the Employer's Objections 1, 5, 7, and 8 can best be resolved by a hearing. We shall therefore order that a hearing be held upon these objections.[1]

ORDER

IT IS HEREBY ORDERED that a hearing be held before a Hearing Officer to be designated by the Regional Director for Region 5, for the purpose of receiving evidence to determine the issues raised by the Employer's Objections 1, 5, 7, and 8, including whether or not Cecil Hall was an agent of Petitioner, and that said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that the Hearing Officer designated for the purpose of conducting the hearing shall prepare and cause to be served on the parties a report containing resolutions of the credibility of witnesses, findings of fact, and recommendations to the Board as the disposition of the issues.

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[1] Member Kennedy would also include Employer's Objection 2 among the objections for which a hearing will be held.

Within 10 days from the date of issuance of such report, any party may file with the Board in Washington, D.C., an original and seven copies of exceptions. The party filing the same shall serve a copy thereof on the other party, and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board will adopt the recommendations of the Hearing Officer and will issue the appropriate order of certification.

Dated, Washington, D.C., January 16, 1974.

EDWARD B. MILLER, Chairman
HOWARD JENKINS, JR., Member
RALPH E. KENNEDY, Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX G

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 5

Case No. 5-RC-8530

ABBOTT LABORATORIES,
ROSS LABORATORIES DIVISION
Employer

and

TEXTILE WORKERS UNION OF AMERICA,
AFL-CIO, CLC
Petitioner

SUPPLEMENTAL REPORT ON OBJECTIONS AND DENIAL OF MOTION FOR RECONSIDERATION

On September 26, 1973, in a Report on Objections and Challenges [1] the undersigned recomemnded that the Employer's objections be overruled in their entirety.

Timely exceptions to the report were filed by the Employer.

On November 15, 1973, the Employer filed with the undersigned a Motion for Reconsideration relying in support thereof on a signed statement fur-

[1] Prior to issuance of the report the two challenged ballots were opened and counted pursuant to the agreement of the parties and Petitioner's majority was thereby established.

nished it by Frederick D. Tubbs [2] on November 9, 1973, a copy of which is attached hereto as Appendix No. 1.

Paragraphs 2 through 5 of Tubbs' November 9, 1973, statement furnished by the Employer in support of its motion are relevant [3] to the issue here before the undersigned.

The pertinent paragraphs are:

> 2. Some time in May or June of 1973 I attended a Union meeting at Leesville Dam. There were about 15 other Ross employees present at the meeting. Before the meeting started, Cecil Hall said to me he would throw me in the lake if I did not vote for the Union. Just before he made this remark the group was talking about someone having dropped out and it was said there was a rat among us. Hall asked me like he did not trust me if I was still for the Union. I said I was and this is when he said he would throw me in the lake if I did not vote for the Union. There is a lake at the Dam site.
>
> 3. About 2 weeks later at another union meeting held at Wayside Park, Hurt, Virginia, there were 10 or 11 Ross employees present. They were talking about sticking together

[2] Tubbs furnished two prior affidavits to Board Agents during the investigation of the objections.

[3] Paragraph 1 merely sets forth Tubbs' job tenure and Paragraph 6 relates to post election conduct. Although not specifically stated in the motion it is apparent that Paragraphs 2 through 4 are in support of Objection No. 1 and that Paragraph 5 is in support of Objection No. 2.

and how every time the Union had a meeting a supervisor found out what was said. I forgot just what it was that was said before but at one point of this discussion Cecil Hall said to me that he would kick my damn ass if I did not vote for the Union. Buddy Crews was in the group at this time. I felt at the time that Cecil Hall meant what he said.

4. Not too long after this meeting I was on my way to punch in near the time clock at the plant when someone asked me if I was for the Union. I said I didn't know. Cecil Hall said to me that he would kick my ass if I did not vote for the Union. I believe he meant this remark.

5. At some of the Union meetings I attended and at different times around the plant I heard Cecil Hall, Monte Kegley, and Acie Brumfield say to other employees including myself that if the Union did not get in the company would fire all of us who were for the Union. These remarks were made after April of 1973 and before the July election.

In his prior affidavits [4] given by Tubbs to the undersigned's agents on August 8, 1973, and September 13, 1973, respectively, Tubbs reports no threats on his person made by Cecil Hall but does report threats of a similar nature made to him by one of the Employer's supervisors. In his first affidavit, Appendix No. 2, Tubbs categorically states, "I was never threatened by Cecil Hall."

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[4] Copies of which are attached hereto as Appendices Nos. 2 and 3, respectively.

Cecil Hall in an affidavit [5] given the undersigned's agent on August 21, 1973, categorically denies that he threatened Tubbs or any other employee.

One employee witness Wayne P. (Buddy) Crews in his affidavit, supports Tubbs' account given in paragraph 3 of his November 9, 1973, signed statement, Appendix No. 1, as follows:

> Also during the Campaign, around the first week of June, 1973 at a union meeting that was held at Wayside Park. I don't remember how the conversation was started but Cecil Hall told Fred Tubbs another employee that if he didn't vote the union, he, Cecil, would kick him in his rear end. I don't know how Cecil Hall meant this statement, that is I don't [know] whether he was serious or not.

In the opinion of the undersigned the conflicting statements made by Tubbs in his various statements seriously detracts from the probative value of the November 9, 1973, signed statement relied on by the Employer in its motion.

With respect to the incident corroborated by employee Crews the undersigned concludes that the threat, if made, when viewed in the context of a campaign devoid of any act of physical violence, is insufficient to warrant setting aside the election. Furthermore, Tubbs in his August 8, 1973, affidavit states that he was never threatened by Hall. Consequently, it appears that Tubbs did not regard the alleged remark, made in shop vernacular, as a threat of personal injury. Accordingly, the undersigned

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[5] A copy of which is attached hereto as Appendix No. 4.

finds no basis to reconsider his recommendation under Objection No. 1.

The remarks attributed to Hall, Kegley and Brumfield by Tubbs in paragraph 5 of Appendix No. 1, if made, constitute their assertions of what the Employer would do if the Petitioner lost the election. Such remarks constitute campaign rhetoric similar to that considered with respect to Objection No. 2 in the Report on Objections and Challenges and consequently does not carry the same onus as a threat made by a party capable of executing it. Rather, it is a partisan remark designed to emphasize the voters need of Petitioner's protection. The Board considers employees to be capable of evaluating such campaign statements.

Accordingly, the undersigned denies the Employer's Motion for Reconsideration.

Dated at Baltimore, Maryland this 29th day of November 1973.

[SEAL]

WILLIAM C. HUMPHREY
William C. Humphrey, Regional Director
National Labor Relations Board, Region 5
1019 Federal Building, Charles Center
Baltimore, Maryland 21201

APPENDIX H

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 5

Case No. 5-RC-8530

ABBOTT LABORATORIES,
ROSS LABORATORIES DIVISION
Employer

and

TEXTILE WORKERS UNION OF AMERICA,
AFL-CIO, CLC
Petitioner

REPORT ON OBJECTIONS AND CHALLENGES

Pursuant to a Stipulation for Certification upon Consent Election [1] approved by the Regional Director on May 22, 1973, a secret-ballot election was conducted under his supervision on July 20, 1973, with the following results:

Approximate number of eligible voters	42
Void ballots	0
Votes cast for Petitioner	21
Votes cast against participating labor organization	19
Valid votes counted	40
Challenged ballots	2
Valid votes counted plus challenged ballots	42

[1] The unit is: "All production and maintenance employees employed by the Employer at its Altavista, Virginia, facilitiy, but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act, as amended."

The challenged ballots reflect the results of the election.

THE CHALLENGES

Pursuant to an agreement of the parties, the two challenged ballots were opened and counted on August 8, 1973. There was one vote cast for the Petitioner and one vote cast against the participating labor organization. Thus of the 42 valid votes cast Petitioner has received 22, a majority, and there are no challenged ballots remaining for disposition.

THE OBJECTIONS

Timely objections to conduct affecting the results of the election were filed by the Employer on July 27, 1973.[2]

The undersigned has caused an investigation to be made, has considered the results thereof and reports as follows:

The objections submitted by the Employer are as follows:

Objection No. 1

During the critical period herein the Petitioner threatened employees of Ross with physical violence to both person and property.

In an affidavit furnished a Board Agent an employee states:

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[2] The eligibility period is the payroll period ending May 20, 1973. The petition was filed on April 13, 1973. The undersigned will consider on its merits only that alleged interference which occurred during the critical period which begins on and includes the date of the filing of the petition and extends through the election. *Goodyear Tire and Rubber Company*, 138 NLRB 453.

On June 5, 1973, I had a conversation with Jim Ferguson in the control room in the power house. Jim Ferguson was a known union supporter. We were talking about what might happen if the union did come in and we went on strike. He knew that I was against the union. I told him that if the employees did go on strike that I would still come to work because I didn't want any part of the union to begin with. He said "That's the way that people's car windshields and cars get torn up."

* * * *

On June 9, 1973, I had a conversation with David Nichols, another power house employee. The conversation took place in the cafeteria. We were talking about the union and strikes, etc. He said that if they went on strike they (the union) would stand on the outside of the door and not let anyone come to work.

The Employer has offered no evidence and none has been adduced during the investigation that Ferguson or Nichols were agents of the Petitioner or that the alleged remarks to the witness were authorized by or known to the Petitioner.

Employees Ferguson and Nichols deny having made the above or similar threats and further deny having been designated by Petitioner to act in its behalf in any capacity.[3] Accordingly, the aforenoted remarks, if made, cannot be imputed to Petitioner.

The Board has held that in considering whether specific acts reasonably tend to interefere with the uninhibited exercise of free choice it accords less

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[3] Confirmed by Petitioner's Regional Director in an affidavit to the undersigned's agent.

weight to the conduct of third persons than to that of the parties. The Board noted, "the conduct of third persons tends to have less effect upon the voters than similar conduct attributable to the Employer who has, or the union which seeks, control over the employees working conditions."[4] Accordingly, the undersigned finds that the above threats alleged to have been made by Ferguson and Nichols do not constitute grounds for setting aside the election.

Further, in support of Objection No. 1 the Employer produced additional employee witnesses who furnished affidavits to the undersigned's agent attributing to employee Cecil Hall,[5] threats of physical violence as follows:

Witness A:

I don't remember who told me, but sometime in June or perhaps a little later then June, I heard from two employees that Cecil Hall made a statement to the effect that: One said "You had better watch out because Hall is after you" and the other said that Hall had said that if I didn't ease up, he (Hall) was going to work me over. Around the same period of time, Fred Tubbs told me that "they" had told him that they were going to kick the shit out of him if he didn't vote for the union. He did not say who "they" were. I asked him about this at a later date, but he would not admit it.

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[4] *Orleans Manufacturing Company*, 120 NLRB 630, 633.

[5] Hall and Acie Brumfield were elected by pro-union employees to be the "contact men between the employees and Petitioner. Both later served as Petitioner's election observers.

Witness B:

About a month before the election, I along with Ron Bean and a couple of other employees whose names I can't remember were talking about the union with Cecil Hall. Hall asked me if I was going to join the union. I told him "no." Hall said that if the union did not come in, he was going to quit because he didn't want to work with any "yellow-bellied son-of-a-bitches." After he said that the conversation broke up and everybody went back to work.

Witness C:

. . . Sometime in June, 1973, I was talking with Cecil Hall a known union supporter, in the packaging lab. He stated to me that he would like to beat the hell out of Gerald Doss, another employee. Gerald Doss works on the packaging line. He had been trying to get the employees to vote against the union. I don't know whether Cecil Hall meant this statement or not.

Hall in his affidavit denies all of the above allegations.

With regard to the statement of witness A above, it appears that a hearsay threat to his person was communicated to him by persons he cannot identify. Witness A reports further hearsay, thrice removed, in connection with Fred Tubbs.

Tubbs in an affidavit denies that Hall or anyone else ever threatened him for not supporting Petitioner and that he never reported any such threat to witness A.[6] Thus Witness A does not furnish probative evidence in support of the objection.

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[6] Tubbs in his affidavit describes a series of threats made to him by a supervisor if he voted for Petitioner.

Witness B reports nothing more than a threat by Hall to quit if the Petitioner did not win the election. Thus Witness B's evidence does not support the gravamen of the objection.

Witness C reports that Hall told him he "would like to beat the hell out of Gerald Doss."

Doss, in an affidavit, states that sometime in June 1973 or later, two employees whose names he can not recall reported to him that Hall was after him and/or was going to work him over if he did not ease up on his campaign against Petitioner.

Assuming *arguendo* that Hall made the remark attributed to him by Witness C, such a remark cannot be construed as a threat of physical violence since there was no indication that Hall intended to take any action to effectuate his announced desire. Further, Hall never communicated this desire directly to Doss. Moreover, this announcement is isolated in an election campaign free from any reported instance of property damage or physical violence. Accordingly, the undersigned recommends that Objection No. 1 be overruled in its entirety.

Objection No. 2

2. During the critical period herein the Petitioner did impute to the Employer intentions of closing its plant, firing its supervisors, prolonging strikes, threats of bodily harm and loss of benefits in the event the union was selected and did thereby create conditions of fear among Ross employees against the Employer.

In support of this objection, the Employer produced a copy of a letter to "Mr. R. Johnson, Manager" dated June 25, 1973 (attached hereto as Appendix No. 1) which was distributed to all Ross employees by Petitioner over the signature of Petitioner's Regional Director Dernoncourt which includes the following statements:

> We now find the Management Representatives are:
>
> 1. Threatening bodily harm to some employees if they vote for the union.
> 2. Have told employees that a Supervisors' meeting if the Union came in they (the Supervisors) would be out of a job.
> 3. Told the employees if the Union came in they could call the people on strike and the Company could kep them out three months if they wanted to.
> 4. Told the employees if the Union came in Ross could close the doors and let spider webs grow all over the place.
>
> * * * *
>
> The employees have also been told that if the Union comes into the plant they will lose all of their existing benefits and they will have to start over.
>
> * * * *
>
> I did not think the Company would be so desperate as to permit Management Representatives to make such misleading statements to the employees.

It is apparent from the statements objected to in Petitioner's June 25, 1973, letter that such statements are not threats of action to be taken against employees by Petitioner but rather are assertions that the

Employer is engaging in misconduct. Therefore, if these assertions are false the conduct objected to by the Employer, is in the nature of a misrepresentation. The undersigned finds it unnecessary to determine whether the objected to assertions are in fact misrepresentations material or otherwise in that the Employer had in excess of three weeks to make an effective response to its employees had it desired to do so. *Hollywood Ceramics Company, Inc.*, 140 NLRB 221.

In support of Objection No. 2 the Employer also produced a copy of a letter dated July 17, 1973, (attached hereto as Appendix No. 2) to "Ross Laboratory Employees" from Petitioner's Regional Director Dernoncourt which included the following objected-to statement: "It has been reported that some are saying that if the Union comes in you will lose your benefits and have to start over."

The undersigned views this statement as no more than a reiteration of one of the assertions in Petitioner's June 25, 1973, letter and as such the Employer had ample opportunity to respond thereto. *The Holtite Manufacturing Co., Inc.*, 146 NLRB 385-387. Moreover, the objected-to assertions are more in the nature of campaign propaganda designed to derogate the motives of the opposition and as such have long been deemed by the Board to be susceptible to evaluation by the electorate.

The Employer cites in support of its position *The Aire-Flo Corporation*, 167 NLRB 679, and *Ipsen Industries Division of Alco Standard Corporation*, 180 NLRB 412, 413, both of which the undersigned finds inapposite. In both cases cited by the Employer ma-

terial misrepresentations were made within 2 days of the election.

In view of the foregoing, the undersigned recommends that Objection No. 2 be overruled in its entirety.

Objection No. 3

> While the polls were open and during the time between voting periods the Petitioner did engage in improper electioneering at and near the polling place.

The Employer's evidence in support of its allegation of Petitioner's electioneering while the polls were open is considered hereafter under Objection No. 8.

In support of the remainder of its allegation that Petitioner engaged in improper electioneering during the period between the early morning and early afternoon polling sessions, the Employer produced three witnesses. The first witness states: Cecil Hall, Petitioner's election observer and another employee believed to be pro-union held up a victory sign (two fingers upraised in a V) and told him "don't worry we have three votes to their one already."

The second witness states: Acie Brumfield, the other Petitioner observer, and another employee believed to be pro-union went through the packaging department holding up their fingers in a victory sign.[7]

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[7] This witness states that by way of hearsay she had learned that Brumfield had also announced Petitioner "had three votes to one already".

The third witness states:

Acie Brumfield requested an employee to support the Union.

The preponderance of the evidence is that Petitioner's two election observers did display the "victory (V) sign [8] during the period between voting sessions and at least one of them expressed the belief the Petitioner was winning by either three to one or two to one.

The thrust of the Employer's argument in support of this objection is that the official capacity of the observers when combined with the displaying of the victory sign and the announcement that Petitioner was winning 3 to 1 (or 2 to 1) created the impression among those who had not yet voted that observers Brumfield and Hall had special knowledge of how the votes had been cast. Furthermore, the trend so announced demonstrated to those who had not voted the futility of voting against Petitioner.

In the opinion of the undersigned the Employer's argument is without merit. It would appear that employees would recognize the objected-to conduct as campaign "puffing" of the type employees have long been held capable of evaluating for themselves, particularly in view of the facts: (1) that employees would have been aware that only a very few employees would have been at the plant to vote at the early session,[9] (2) that the Notice of Election clearly

[8] Both contend that this sign is a common form of greeting used by them and some others in the plant.

[9] Only 4 or 5 employees voted in the early morning session of which 3 were observers. Fewer than 9 employees are scheduled to report to work earlier than 7 a.m.

and prominently stated that the ballots would be commingled and counted at 2:35 p.m., after the close of the final session, and (3) employees could see for themselves when they went to vote that observers had no way of knowing how any voter had cast his ballot. Accordingly, the undersigned recommends that Objection No. 3 be overruled.

Objection No. 4

> During the critical period herein the Petitioner threatened Ross employees with loss of employment if they did not become members of and support the Petitioner.

The Petitioner produced no evidence in support of this objection. Accordingly, the undersigned overrules Objection No. 4 in its entirety.

Objection No. 5

> During the critical period herein the official NLRB Notices of Election were improperly marked and defaced by Petitioner and its supporters so as to benefit the Petitioner.

In support of Objection No. 5, Richard Paul, a supervisor, states that he observed employee Wilson Reynolds deface the official NLRB notices of election on Thursday, July 19, 1973, by putting a black dot in each of the corners of the "Yes" box. Paul states further that Reynolds replied that he was not defacing the ballot but was writing on the plastic that covered the notice.

Paul asserts he observed Reynolds mark an "X" in the "Yes" box of the same notice on election day at about 9:30 a.m. or 10 a.m. The polls were open

from 5:30 to 5:45 a.m. and 1:30 to 2:30 p.m. He again told Reynolds that the notices were not to be defaced and Reynolds made the same reply as on the prior occasion.

Paul states that the election notice was posted on the bulletin board near the door closest to the cafeteria. There were four laboratory employees who voted at the afternoon session after the notice was defaced. He does not know whether the employees saw the defaced election notice and admits that he did not take the defaced notice down.

The employee named by Paul denies defacing the Election Notice but admits that at about 2:30 p.m., after returning from the polls where he was one of the last to vote, he encountered Paul who in "playing around" with him pretended to mark an "X" in the "No" box, whereupon he, the employee, placed a dot on the plastic over each corner of the "Yes" box. He denies having marked the sample ballot on any other occasion. The employee also denies having been designated to act in any capacity for Petitioner.

Petitioner's Regional Director Dernoncourt, on behalf of Petitioner, asserts that the named employee was not authorized to act in Petitioner's behalf in any capacity during the campaign. Furthermore, it is apparent from Superivsor Paul's account of the incident, the Employer was aware of the defacement simultaneously with its occurrence and could have promptly replaced the notice.

Thus, in the absence of evidence establishing agency, the conduct of the named employee in marking the election notice, assuming arguendo, that he did so on two occasions, cannot be imputed to Petitioner[10] and does not constitute grounds for setting aside the election. *Lloyd A. Fry Roofing Company*, 108 NLRB 1247, 1289; *Murray China Co., Inc.*, 117 NLRB 1385; *Orleans Manufacturing Company*, 120 NLRB 630, 633.

In view of the foregoing, the undersigned recommends that Objection No. 5 be overruled.

Objection No. 6

> During the critical period herein the Petitioner did allege facts concerning its bargaining relationship and achievements with other employees which were designed to mislead Ross employees into supporting Petitioner.

In support of this objection, the Employer relies on Petitioner's letter to Ross employees dated July 17, 1973 (Appendix No. 2), which includes the following statement in bold caps:

> WHY DOESN'T THE COMPANY TALK ABOUT MERCK CHEMICAL COMPANY, INC., IN ELKTON, VIRGINIA. THEY ARE IN THE SAME INDUSTRY AS ROSS. WHY DON'T THEY TELL YOU WE HAVE JUST NEGOTIATED A SUBSTANTIAL WAGE INCREASE, IMPROVEMENT IN INSURANCE, IMPROVEMENT IN PENSIONS, HOLIDAYS, ETC., ALL OF THIS WITHOUT A STRIKE. THE REASON THEY DON'T WANT TO TALK ABOUT THIS IS BECAUSE IT

[10] The Employer relies on *Mademoiselle Shoppes, Inc.*, 199 NLRB No. 147, in support of its position herein. This case is inapposite. The Administrative Law Judge's admittedly "harsh" rule applies only when the defacement can be attributed to one of the parties or its agents.

DOESN'T FIT INTO THEIR PATTERN OF TRYING TO DIVIDE AND SCARE.

The Employer's position is that the above-quoted assertion is a material misrepresentation because Petitioner represents only a small group of office clerical and technical employees at Merck's Elkton, Virginia, plant and played only a minor role on the coordinated bargaining committee along with two other International Unions which represent most of Merck's production and maintenance employees throughout the United States. In support of its position the Employer cites *Zarn, Inc.*, 170 NLRB 1135 and *Allis Chalmers Manufacturing Company*, 176 NLRB 588.

The Employer does not contend nor did it produce evidence that Petitioner's objected-to assertion is false as regards the existence or the quality of the benefits claimed but rather that Peitioner experienced little difficulty in negotiating them because of alleged fortuitous circumstances. Petitioner's leaflet did not indicate the difficulty with which the benefits were negotiated other than to state they were obtained without a srike. Therefore the undersigned finds that the objected-to assertion does not constitute a misrepresentation. The cases relied on by the Employer herein are inapposite in that each involved material misrepresentations of fact.

Accordingly, the undersigned recommends that Objection No. 6 be overruled in its entirety.

In Objections Nos. 7, 8 and 9 the Employer asserts that conduct engaged in at the polls during the voting period warrants setting aside the election.

Objection No. 7

During the time when the polls were opened the Board Agent in charge of the election engaged in conversation and made remarks to the election observers, three of whom were eligible voters which conversation and remarks were prejudicial to the Employer.

In support of this objection the Employer relies on evidence furnished in affidavits from its two election observers. These witnesses state in substance that during the second of the two polling periods the conversation between the observers and Board Agent turned to unions and NLRB elections in general, and that during this conversation the Board Agent informed them:

1. That he once worked on a 15,000 man election at which the count of ballots began while the voting was still in progress.
2. That he was a member of a union and had benefitted thereby.
3. That he had known and worked with Wayne Dernoncourt, the Petitioner's Regional Director for many years.
4. That when asked by an Employer's observer if he worked for a union he responded in the affirmative.

Employer's observers do not allege that any of the foregoing conversations took place while voters were present.[11] They state that the Board Agent did nothing to discourage such conversation between the observers and in effect condoned it by his participation.

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[11] It is to be noted that all eligible observers voted at the first or morning session.

The Board Agent in his affidavit confirms that during extended periods of the last polling session when no voters were in the polls the observers and he engaged in conversation covering, in general, topics alluded to by the Employer's witnesses. With respect to each of the specific allegations relied on by the Employer the Board Agent states:

1. That in describing the 15,000 man election in which he participated he informed them that the count of the ballots began before all of the ballots had been opened and sorted.[12]
2. That in response to a question as to whether he belonged to a union he answered in the affirmative.
3. That he informed the observers, when asked if he knew Petitioner's Regional Director, that he had known him for a number of years and had worked with him on a number of cases.
4. That he never informed the observers that he worked for a union but did, as in (2) above, state that he was a member of a union.

Assuming, *arguendo*, that the Employer's observers' versions of the conversations are correct, it is not apparent to the undersigned how such conversations, under the circumstances herein, could have

[12] As is the practice in all split-session or multi-polling place elections the Notice of Election prominently displays a legend similar to that inscribed on the Notice herein: ALL BALLOTS WILL BE COMMINGLED AND COUNTED TOGETHER AT APPROXIMATELY 2:35 P.M. ON JULY 20, 1973 AT THE EMPLOYER'S ALTA VISTA, VIRGINIA LOCATION.

prejudiced the Employer. The objected-to comments, if made, were made to and in the presence of employees who had already cast their ballots at a time and under circumstances that precluded the possibility that the objected-to remarks could have been imparted to prospective voters.

Moreover, the undersigned does not find that the remarks attributed to the Board Agent herein establish an appearance of bias in favor of Petitioner or raise a question of the integrity of this election. *Wabash Transformer Corporation*, 205 NLRB No. 38.

Further in support its objection, the Employer's observers state that the Board Agent informed them that they could not keep a list of those who voted, but during the second polling session permitted the observers to review the official eligibility list to determine how many eligibles had not voted. It is not alleged that the observers were asked or permitted to make a list of voters or non-voters; nor is it alleged that any list of voters was maintained except for the official election eligibility list which is retained in the Regional Office file. Accordingly, the conduct alleged does not constitute grounds for objections to the election.

The Employer further objects that the Board Agent requested the observers to sign the Certification of Conduct of Election prior to the scheduled time for closing the polls, and such a request constitutes an abuse of discretion even though as here all employees had voted. In that the undersigned has considered all the objections to the conduct of the election, the Employer is not prejudiced by the al-

leged premature request or by the fact that its observers signed the document in issue. Accordingly, this objection is without merit.

In summary, the undersigned recommends that Employer's Objection No. 7 be overruled in its entirety.

Objection No. 8

> During the time the polls were open the Board Agent in charge permitted the Union election observer to engage in conduct which destroyed the appearance of neutrality to the conduct of a fair election.

Specifically in support of Objection No. 8 the Employer relies on the undisputed fact that during the election one of Petitioner's two observers, Cecil Hall, was at his request, permitted by the Board Agent to stand rather than be seated. The employer contends that by his position in relation to employees in line to vote and by certain "facial expressions", primarily smiles, Hall interfered with the requisite atmosphere of the polling place.

The evidence, including affidavits from those present and posed photographs furnished by the Employer (a photocopy of one such photograph is attached hereto as Appendix No. 3—Hall is simulated therein as Union Observer #1) establishes that Hall stood at the end of the election checking table, at which the other three observers were seated, two to four feet from the chair in which he would have otherwise been sitting. Thus voters approaching the checking table would first have encountered Hall, whether he was seated or standing and they would have come as close or closer to the other observers

in the process of having their names checked off the eligibility list prior to voting. Moreover, Hall's position placed him no closer to the voting booth itself, a distance of 13-14 feet, than the other observers. Thus, the undersigned is unable to discern how the fact that Hall remained standing in the area described above with the Board Agent's permission, can constitute grounds for setting aside the election. Moreover, it is relatively common for observers not concerned with checking names off the eligibility list to position themselves so as to have a clear view of the voting booth and ballot box to assure that voters cast their ballots in secret and deposit them in the ballot box.[13]

With regard to Hall's conduct while serving as an observer, there is no evidence that he did more than smile or nod to several voters. It is not alleged nor was evidence produced that Hall uttered a single word to any voter or that any of the complained of "facial expressions" were of such nature as to interfere with an employee's unfettered choice in an election.[14] Accordingly, the undersigned recommends that Objection No. 8 be overruled in its entirety.

Objection No. 9

> During the time when the polls were open the security of the ballots was not maintained in that it was possible to observe the designation

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[13] Hall denies that he observed how any voter cast his ballot.

[14] *Milchem, Inc.*, 170 NLRB 362, and *Modern Hard Chrome Service Co.*, 187 NLRB 82, relied on by the Employer are inapposite in that both involved *conversations* between agents of the parties and voters.

of the voter at the time a ballot was deposited in the official ballot bag.

In support of this objection, the Employer produced evidence of a single incident wherein an employee in line to vote states that he was able to see the marking on a co-worker's ballot as the co-worker experienced some difficulty in inserting the ballot in the standard NLRB ballot bag. The witness states that he and his co-worker were the only voters in the polls at the time and on the assumption that the observers could likewise view his ballot [15] he took special precautions to avoid this possibility when he deposited his ballot.

Investigation, including inspection and measurement of the polling place, discloses that the observers and employees in line to vote were not closer than 12-14 feet from the voter depositing his ballot in the bag.

After careful consideration of all the evidence, it is concluded that the evidence does not warrant setting the election aside. There is no evidence that any voter deliberately attempted to reveal how he or she had voted, nor is there any evidence that the votes cast were observable by other employees, except in the one instance alluded to by the witness. And, the witness could have observed the alleged incident only if he made a determined effort to do so. Moreover, no complaint was registered with the Board Agent in this connection. Accordingly, it is recommended that Objection No. 9 be overruled in its entirety.

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[15] Observers stated they did not see how any employee voted.

Objection No. 10

By the above and other similar acts of intimidation, coercion, improper electioneering and improper methods of conducting the election, the Board standards of impartiality and fairness were violated.

For the reason set forth above the election should be set aside and a new election ordered.

The Employer has produced no evidence other than that considered by the undersigned under Objections 1 through 9. Accordingly, it is recommended that Objection No. 10 be overruled.

In summary, the undersigned recommends that the Employer's Objections be overruled and that an appropriate Certification of Representative issue.

Dated at Baltimore, Maryland this 26th day of September, 1973.

WILLIAM C. HUMPHREY
William C. Humphrey, Regional Director
National Labor Relations Board, Region 5
1019 Federal Building, Charles Center
Baltimore, Maryland 21201

APPENDIX I

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, (61 Stat. 136, 29 U.S.C. §§ 151, *et seq.*) are as follows:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)
>
> * * * *
>
> Sec. 10 * * *
>
> (f) Any person aggrieved by a final order of the Board . . . may obtain review of such order . . . in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in. . . . [T]he court shall proceed . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the order of the Board; the findings of the Board with respect to question of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive.

The relevant provision of the Rules and Regulations of the National Labor Relations Board, Series 8, as amended, § 102.69(f), 29 C.F.R. § 102.69(f), provides in pertinent part:

> In a case involving a consent election . . . if exceptions are filed, either to the report on challenged ballots or objections . . . and it appears to the Board that such exceptions do not raise substantial and material issues with respect to the conduct or results of the election, the Board may decide the matter forthwith upon the record, or may make other disposition of the case. If it appears to the Board that such exceptions arise substantial and material factual issues, the Board may direct the regional director or other agent of the Board to issue and cause to be served on the parties a notice of hearing on said exceptions before a hearing officer.